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In the Supreme Court of the United States

October Term, 1982

MILLER BREWING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MALLORY ERLE PHILLIPS, JR.*
MARK E. EDWARDS
FISHER & PHILLIPS
3500 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-9200
Attorneys for Petitioner,
Miller Brewing Company

Of Counsel:
DANIEL P. DOCKERY
3939 West Highland Blvd.
Milwaukee, Wisconsin 53201

*Counsel of Record

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED FOR REVIEW

Whether union officials may be held to a higher duty than rank-and-file employees to uphold a collectively bargained no-strike agreement, including an obligation to take affirmative steps to deter or end any action in breach thereof, and whether an employer commits an unfair labor practice by selectively disciplining union officials for failing to satisfy that duty.

PARTIES TO THE PROCEEDING BELOW

The case below, in which Miller Brewing Company petitioned for review of an order of the National Labor Relations Board (Case No. 81-1413), was consolidated with Case No. 81-1054. In the latter case, Ervin Szewczuga and Gerald Treichel, charging parties before the National Labor Relations Board, sought to review the remedial aspects of the Board's order.

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No.

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MILLER BREWING COMPANY,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit (A1) is not officially reported. The Decision and Order of the National Labor Relations Board (A26) is reported at 254 N.L.R.B. 266.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

Labor Management Relations Act:

Section 8(a)(1), 29 U.S.C. §158(a)(1) (1976):

"(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Setcion 7; . . . ."

Section 8(a)(3), 29 U.S.C. §158(a)(3) (1976):

"(a) It shall be an unfair labor practice for an employer—

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership of any labor organization. . . ."

STATEMENT OF THE CASE

On approximately October 24, 1977, a dispute arose at Miller Brewing Company's Milwaukee brewery concerning whether the Machinists' Union or the Electricians' Union had jurisdiction over the work involved in installing a piece of equipment known as a Filtec. Because the Machinists' Union lodged a complaint, work being performed on the Filtec by a subcontractor's electricians was temporarily suspended so that the complaint of the Machinists could be investigated. During the investigation, it was decided that the outside electricians would continue doing the work for an indefinite period of time. Rep-

resentatives of each Union were asked to supply information concerning the possible jurisdiction over the Filtec work. After evaluating this information, the Company determined to assign the work to the Machinists. This decision was placed in written form and distributed to representatives of both Unions at a meeting on November 1, 1977. (A47-49).

Ervin Szewczuga and Gerald Treichel attended this meeting on behalf of the Electricians and expressed their extreme dissatisfaction with the decision. During the meeting, Szewczuga stated that it seemed that an individual had to be a "rabble-rouser" in order to get anything and Joe Paulicivic, the Labor Relations Manager, warned those in attendance against resorting to self-help rather than using the grievance procedure. (A49).

Szewczuga and Treichel returned to their work areas and reported the Company's decision to their constituents. Upon learning of the decision, they became extremely angry and various individuals raised the possibility of a walkout. (A51, 57). After this initial meeting, Szewczuga and Treichel discussed the matter with Ted Collins, another Union Steward for the Electricians, to determine if any discussions in recent contract negotiations might pertain to this work assignment. It was suggested at this meeting that they wait until the Machinists did some of the work and file a grievance. This suggestion was then related to the rank and file. (A52).

The suggestion to file a grievance was rejected quickly, and with relatively little discussion the employees decided to walk off the job and go to the union hall. Stewards Szewczuga and Treichel then clocked out, changed clothes, and prepared to go to the union hall. Notably, Steward Treichel was the first individual to clock out. (A55).

During this time, Steward Collins also discovered that his people intended to leave the brewery. Upon learning of this, he immediately advised his supervisor that there was a problem and that he was going to try to keep his people there. Shortly thereafter, Paulicivic and Dan Feinsinger, Industrial Relations Manager, arrived to assist Collins in talking to his people. Henry Carrera, the Local Business Representative, also arrived and all four of them convinced these employees not to leave the brewery. (A 61-62).

The Company was not as successful with the two groups headed by Szewczuga and Treichel. Although approached by representatives of management who advised them that it was illegal to walk out and that they would be subject to discharge if they did so, Szewczuga and Treichel continued in their walkout. Although neither Szewczuga nor Treichel ordered any employee to disobey the management representatives' orders to return to work, they also did not urge the employees to return to work or make any other effort to dissuade the employees from leaving. (A56, 60).

After leaving the Brewery, the two groups of employees went to the Union Hall. There, they met with Business Representative Carrera, who advised them that the proper course of action would be to file a grievance and resolve the matter under the auspices of the National Labor Relations Board.[1] The next day, the Electricians who had walked off the job reported to work at their normal time. (A66).

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1. The matter was referred to the Board and the assignment of the work to the Machinists was upheld. *Local 494, International Brotherhood of Electrical Workers*, 235 N.L.R.B. 1550 (1978).

Following the return of the Electricians, the Company immediately initiated an investigation into the strike. All employees who participated in the activities of that day, as well as all supervisors, were questioned. Based on the facts that were compiled during the investigation, it was concluded that there were three groups of people involved. First, those who had stopped work but remained on the premises; secondly, those who had stopped work and left the premises; and finally, those who had led the walkout. Based on these levels of involvement, three different levels of discipline were recommended. Written warnings were given to those individuals who participated but did not leave the premises. A three-day suspension without pay was given to those who had left, and termination was given to those who had led the walkout. With respect to the third level, management determined that Szewczuga and Treichel had acted as the effective leaders of the walkout and had not taken appropriate action to deter the strike. (A67).

Grievances filed by Treichel and Szewczuga were processed to arbitration with the arbitrator determining the discharges were not contrary to the provisions of the collective bargaining agreement. (A71). An unfair labor practice charge was filed with the National Labor Relations Board alleging violations of Sections 8(a)(1) and (3) of the Labor Management Relations Act, 29 U.S.C. §§158 (a)(1) and (3) (1976). A complaint was issued by the Board on August 11, 1978, and a hearing was held before an Administrative Law Judge on January 15-17, 1979. On April 2, 1980, the Administrative Law Judge issued his decision, finding that Miller Brewing Company had violated the provisions of Sections 8(a)(1) and (3) of the Act. (A39). On January 14, 1981, the Board affirmed the decision of the Administrative Law Judge. (A26). Fol-

lowing Petitions for Review filed by both the charging parties and the employer, the Court of Appeals for the District of Columbia Circuit enforced the Board's order in all respects on August 17, 1982. (A1).

REASONS FOR ALLOWING THE WRIT

An Important Question of Labor Law Exists That This Court Should Settle Concerning the Duty of Union Officials to Honor and Enforce a No-Strike Pledge.[2]

During the initial years of labor relations under the Labor Management Relations Act, the principle became well established in the field that a union official had a greater duty to abide by the terms of a no-strike commitment in a collective bargaining agreement and that an employer could impose more severe discipline on such an official than that imposed on a rank-and-file employee for violating the commitment. This principle had developed in the decisions of labor arbitrators. In 1946, however, a strike occurred at the Stockham Pipe Fittings Company. Although not remarkable in itself, the strike was the subject of both an arbitration and an unfair labor practice proceeding before the National Labor Relations Board.

In *Stockham Pipe Fittings Company*, 4 Lab. Arb. 744 (1946), Arbitrator Whitley P. McCoy, recognizing established arbitral authority, held that an employer could discipline union officials more severely than the rank-and-file employees for their participation in an unauthorized strike:

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2. This Court has granted certiorari in *Metropolitan Edison Company v. NLRB*, 663 F.2d 478 (3rd Cir. 1981), *cert. granted*, No. 81-1664 (June 14, 1982). The question presented in this case was also presented in that case.

> Joining other employees in a strike that violates a contract . . . may be expected of the ordinary member of a union and is not ground for singling him out for penalty. Likewise as to failure to take steps to end an unauthorized strike. But a different principle is applicable to officers and committeemen of the union. Union office carries with it responsibilities and obligations both to the company and to the union.

Id. at 745-46.

In resolving the unfair labor practice charge that arose out of this strike, the Board rejected the General Counsel's assertion that the employer violated Sections 8(a)(1) and (3) of the Act, 29 U.S.C. §§158(a)(1) and (3) (1976), by disciplining a union official more severely than other participants in the strike:

> [W]e are convinced on this record that Falkner, as the admitted leader of the Local, and as one of the negotiators and signatories to a valid no-strike agreement between the Union and Respondent, had an even greater duty than the rank-and-file employees to uphold its provisions.

Stockham Pipe Fittings Company, 84 N.L.R.B. 629 (1949). Thus, in its first reported opportunity to address the question, it accepted the well-established principle that had been developed by labor arbitrators.

For the next 28 years, the Board and arbitrators were uniform in their approach to this problem. *See, e.g., Super Valu Xenia*, 228 N.L.R.B. 1254 (1977); *Russell Packing Company*, 133 N.L.R.B. 194 (1961); *University Overland Express, Inc.*, 129 N.L.R.B. 82 (1960); *ITT Thompson Industries, Inc.*, 70 Lab. Arb. 970 (1978) (Seifer, Arb.); *Parker Company*, 60 Lab. Arb. 473 (1973) (Edwards, Arb.);

Elgin Sweeper Company, 50 Lab. Arb. 1029 (1968) (Graff, Arb.)

It is evident throughout this long period of time that the Board and labor arbitrators were simply recognizing reality: Union officers necessarily are leaders of any work stoppage in which they participate. It is preposterous to suggest that a union official can step out of this leadership position when he joins a work stoppage. As stated by one arbitrator:

> When Union Stewards and other Union officers participate in an illegal walkout, by the mere fact of that participation as Union officials, they provide leadership support for the strike, leadership which inescapably goes beyond the mere following of other workmen who have no recognized and official leadership positions in the Union.

Litton Systems, Inc., 71-1 Lab. Arb. Awards ¶ 8215 at 3710-11 (1971) (Abernathy, Arb.).

This understanding was not limited to labor arbitrators. In *Chrsyler Corp.*, 232 N.L.R.B. 466 (1977), the Board upheld a decision approving the discharge of a union shop steward for his role in an unauthorized work stoppage and adopted the following language:

> Smith was elected to his position as shop steward by the second-shift employees in his department on two occasions. *He did not cease to be a leader of these people in matters involving labor relations merely by leaving the plant gates . . . Accordingly, in light of considerations relating to his status alone*, in addition to his actions on the afternoon and evening in question, *I conclude that Smith not only was engaged in an illegal walkout but that his presence provided this action with his active approval and encouragement*, not

> merely negative leadership, and that respondent had ample basis for concluding that Smith exercised a leadership role in the walkout when it determined to discharge him. . . .

Id. at 475 (emphasis added)

In light of the influential position of union stewards in the work place, it is no wonder that the principle that union stewards can be held to a higher standard of conduct concerning compliance with a no-strike obligation became firmly established. This principle was well stated in *United Parcel Service*, 47 Lab. Arb. 1100 (1966) (Schmertz, Arb.):

> If there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to faithfully adhere to all of the provisions of the Collective Bargaining Agreement and to actively instruct each employee to do so as well. While it is improper for an ordinary employee to deliberately breach the Agreement, a similar act by a shop steward is untenable and grounds for his discharge. It is the obligation of the steward to set an example for all union members within his jurisdiction by demonstrating his loyalty to the terms and conditions of the contract negotiated by his Union with the Employer. . . . Indeed, a shop steward's duty in the face of an unauthorized strike is well settled. Not only should he make a determined effort to prevent the stoppage before it begins, but upon its development must actively and unequivocally attempt to bring an end to the stoppage at the earliest possible moment.

Id. at 1100-01. As a result of this higher standard, a more severe penalty for its violation is appropriate.

> It follows inescapably that when a Union steward or committeeman participates in a work stoppage . . . he

> is setting an example for the other employees in indicating by his action that the stoppage has his tacit approval and sanction. This is a graver offense than participation by an ordinary employee and justifies a more serious penalty.

International Harvester Company, 14 Lab. Arb. 986, 988 (1950) (Seward, Arb.).

In *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 581-82 (1960), this Court found that "the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." Thus, when the Board addressed this issue in *Precision Castings Company*, 233 N.L.R.B. 183 (1977), there was no question that the ability of employers to discipline union officials more severely than rank-and-file employees for participating in an unlawful work stoppage was firmly established in the law.[3]

In *Precision Castings*, the Board, without explanation, rejected these years of Board and arbitral authority and held that it was an unfair labor practice to discipline a union official more severely than rank-and-file employees for participating in an unauthorized work stoppage in violation of a collective bargaining agreement. According to the Board, this was discrimination directed against an employee on the basis of holding union office.

In subsequent decisions, the Board made it clear that this was was a *per se* rule and absent clear and convincing evidence that the union official actively instigated the strike, the discipline could not be any different than that

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3. It is noteworthy that the strike at the Milwaukee brewery occurred on November 1, 1977. The decision in *Precision Castings Company* was issued on November 3, 1977.

imposed on other participants. *See, e.g., Bethlehem Steel Corp.*, 252 N.L.R.B. 982 (1980), *enf. denied sub nom., Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982); *Metropolitan Edison Company*, 252 N.L.R.B. 1030 (1980), *enforced*, 663 F.2d 478 (3rd Cir. 1981), *cert. granted*, No. 81-1664 (June 14, 1982); *Armour-Dial, Inc.*, 245 N.L.R.B. 959 (1979), *enf. denied*, 638 F.2d 51 (8th Cir. 1981); *Gould Corporation*, 237 N.L.R.B. 881 (1978), *enf. denied*, 612 F.2d 728 (3rd Cir. 1979), *cert. denied sub nom., Moran v. Gould Corp.*, 449 U.S. 890 (1980); *Indiana and Michigan Electric Company*, 237 N.L.R.B. 226 (1978), *enf. denied*, 599 F.2d 227 (7th Cir. 1979).

The theory behind the Board's *per se* approach to this problem was that the more severe discipline of the union officials would deter them and others from holding union office. This theory was rejected quickly by the first court of appeals to address the question. In *Indiana and Michigan Electric Company v. NLRB*, 599 F.2d 227 (7th Cir. 1979), the court said:

> Employer action that would impair some right or restrict some legitimate activity of union officials and thereby discourage members from holding union office would no doubt have an inherently adverse effect on employee rights. The same is not true, however, of employer action that at most deters union officials from deliberately engaging in clearly unlawful conduct that is both a violation of their duties as employees and union members and a repudiation of their responsibilities as union officials.

Id. at 228. *Accord NLRB v. Armour-Dial, Inc.*, 638 F.2d 51 (8th Cir. 1981).

Shortly thereafter, the Court of Appeals for the Third Circuit also rejected this theory in denying enforcement to a Board order:

> As for the contention that as a result of this ruling prospective stewards will be dissuaded from seeking union office, the obvious and short answer is that they should be deterred from seeking office if they intend thereafter to participate in illegal work stoppages or to repudiate contractual obligations which were freely negotiated and voluntarily assumed. The company's action and our ruling deters no other kind of 'union' activity.

Gould, Inc. v. NLRB, 612 F.2d 728, 733-34 (3rd Cir. 1979), *cert. denied sub nom., Moran v. Gould Corp.*, 449 U.S. 890 (1980).

Although the courts have remained firm in their rejection of the Board's theory that such discipline will deter people from accepting leadership positions with a union, the D. C. Circuit and the Third Circuit have adopted approaches that are not consistent with the generally accepted industrial practice discussed above. In a split decision, the Third Circuit required that any obligation of a union official to take action to deter or end an unauthorized strike must be specifically stated in the collective bargaining agreement. *Hammermill Paper Company v. NLRB*, 658 F.2d 155 (3rd Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3622 (U.S. Feb. 9, 1982) (No. 81-1438). Thus, although it rejected the Board's *per se* rule, it affirmed the finding of an unfair labor practice because of the lack of express contract language.

The Third Circuit continued its retreat from generally accepted industrial practice in *Metropolitan Edison Company v. NLRB*, 663 F.2d 478 (3rd Cir. 1981), *cert. granted*, No. 81-1664 (June 14, 1982). In that case, the court adhered to its previous decision that the antistrike obligations must appear on the face of the collective bargaining agreement. In so doing, the court rejected the employer's

contention that a series of arbitration decisions interpreting the contract as requiring such affirmative antistrike conduct was just as good as specific contract language.[4]

In *Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982), the court disagreed with the Third Circuit's approach in *Metropolitan Edison*.

In denying enforcement of a Board order, the court held:

> [W]here the collective bargaining process has imposed higher duties upon union officials than the rank-and-file, the officials may be more harshly punished than the rank-and-file for their conduct in violation of the no-strike clause and an employer's selective discipline of the offending union official will not constitute an unfair labor practice.

Id. at 341.

The D. C. Circuit determined that the "collective bargaining process" included previous arbitration decisions interpreting the collective bargaining agreement. Thus, because of a series of arbitration decisions interpreting the no-strike language as imposing greater obligations to abide by its terms on union officials, the court found no violation in the employer's decision to discipline an offending union committeeman more severely than the rank-and-file.

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4. In *C. H. Heist Corp. v. NLRB*, 657 F.2d 178 (7th Cir. 1981), the court found that the steward had complied with the higher duty imposed on him by a general no-strike clause and enforced the Board's order. The court determined that the only thing the steward did not do was cross the picket line and in the absence of a contract provision requiring him to do so, the court declined to say that this was necessary to meet his greater duty.

In the instant case, however, the D. C. Circuit court refused to find that the "collective bargaining process" included anything other than the words of the collective bargaining agreement and the interpretation of those words by an arbitrator. Thus, it held that Miller Brewing Company had committed an unfair labor practice when it imposed more severe discipline on the two stewards who participated in the unauthorized work stoppage than on rank-and-file employees who had participated. In reaching this decision, the court noted that the collective bargaining agreement did not contain specific language imposing greater obligations on union officials in the event of an unauthorized strike. Moreover, the court found that the simple fact that an arbitrator had found that the discipline was not contrary to the collective bargaining agreement was insufficient to establish that the contract imposed greater duties on the stewards.

The court ignored the substantial case law that had developed from arbitrators and the earlier decisions of the Board. As this Court stated in *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 581-82 (1960), "the industrial common law—*the practices of the industry* and the shop—is equally a part of the collective bargaining agreement although not expressed in it." (Emphasis added). The decision of the D. C. Circuit in the instant case clearly rejects this and renders meaingless the years of industry practice that had become a part of labor relations in this country.

If the principle advocated by the Court of Appeals for the District of Columbia is allowed to stand, there will be no validity to a no-strike clause. According to the court, if there is no specific language in the contract or arbitration decisions under the contract that requires union officials to take action to deter or end an unau-

thorized strike, then they have no obligation to do so. The court forgets the vast amount of arbitral and Board precedent that existed when the contract language was adopted by the parties.

If an employer cannot count on the union leadership to take action to deter or end an unauthorized strike, there is no value to the employer in having a no-strike clause and granting the union leadership benefits that enhance the power of their position. Why should credence be given to the words and promises of a union official if the employer cannot count on that official to act to uphold the contract?

An employer's ability to impose discipline on union officials is, for all practical purposes, the only effective means the employer has to compel action on the part of these officials to seek to deter or end unauthorized strikes. An employer cannot recover damages from the individual strikers. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981).[5] Moreover, unless the employer can fit within the narrow exemption granted by *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), and *Buffalo Forge Company v. United Steelworkers*, 428 U.S. 397 (1976), injunctive relief is barred by Section 4 of the Norris-LaGuardia Act, 29 U.S.C. §104 (1976). Even if injunctive relief is available, the length of time necessary to obtain an injunction significantly diminishes the deterrent effect of this remedy.

It is evident that the state of the law in this area is confused. Four circuits have addressed the question with varying results. As is evident in the Board's decision in

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5. In a true wildcat strike, damages cannot be obtained from the union. *Carbon Fuel Company v. United Mine Workers*, 444 U.S. 212 (1979).

the instant case and others raising this issue, not even the Board can reach a consensus on the issue.[6] Thus, it is imperative that employers be given clear, logical guidelines concerning the obligations of union officials and the rights of employers to take disciplinary action. This is an extremely significant question in the field of labor relations and the confusion that currently exists should be resolved by the Supreme Court.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

MALLORY ERLE PHILLIPS, JR.
MARK E. EDWARDS
FISHER & PHILLIPS
3500 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-9200
Attorneys for Petitioner

Of Counsel:
DANIEL P. DOCKERY
3939 West Highland Boulevard
Milwaukee, Wisconsin 53201

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6. In its most recent decision on the subject, *Consolidation Coal Company*, 263 N.L.R.B. No. 188 (1982), two members of the Board voted to retain the *per se* rule and two members voted to reject this position and return to the well-established principle advocated by Petitioner.

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1054

ERVIN SZEWCZUGA and GERALD TREICHEL, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 81-1413

MILLER BREWING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petitions for Review of an Order of the
National Labor Relations Board and
Cross-Application for Enforcement

Argued February 12, 1982

Decided August 17, 1982

Judgment entered this date

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Erle Phillips, with whom *Mark E. Edwards* and *Daniel P. Dockery* were on the brief, for petitioner in No. 81-1413.

Gerry M. Miller, with whom *Scott D. Soldon* was on the brief, for petitioners in No. 31-1054.

Elliott Moore, Deputy Association General Counsel, National Labor Relations Board, with whom *John G. Elligers*, Attorney, National Labor Relations Board, was on the brief, for respondent.

Before ROBINSON, *Chief Judge*, MCGOWAN, *Senior Circuit Judge*, and NORTHROP *, *United States Senior District Judge* for the District of Maryland.

Opinion for the Court filed by *Senior Circuit Judge* MCGOWAN.

MCGOWAN, *Senior Circuit Judge*: Following a contractually forbidden strike by some of the electricians at its Milwaukee brewery, Miller Brewing Company suspended the rank-and-file participants for three days, but discharged two union stewards who joined the walkout. The National Labor Relations Board ("NLRB" or "Board") decided that Miller had violated sections 8(a)(1) and (3) of the National Labor Relations Act ("NLRA" or "Act") [1] by discharging the two stewards,

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] Sections 8(a)(1) and (3), 29 U.S.C. §§ 158(a)(1), (3), provide, in pertinent part:

> (a) *Unfair labor practices by employer*
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> It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
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> ....
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> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ....

and ordered Miller to reinstate them, with back pay for the period by which their discipline exceeded that given to the rank and file. Miller has petitioned for review of the Board's order, as have the two stewards, Ervin Szewczuga and Gerald Treichel. The Board has cross-petitioned for enforcement of its order.[2]

We enforce the Board's order in all respects. We conclude that substantial evidence supports the Board's determination that Szewczuga and Treichel were not strike leaders, and that Miller officials had no basis for believing that they were. We also answer a question left open in our recent decision in *Fournelle v. NLRB*, 670 F.2d 331, 338 (D.C. Cir. 1982): we hold that an employer may not impose disparate discipline on a union official who engages in an unprotected strike, if the official was not a leader of the strike and if the collective bargaining process has not explicity created higher duties for union officials during such strikes. As to the stewards' challenge, we find the Board's remedy an appropriate one for the violation found.

I. Background

Petitioners Szewczuga and Treichel filed an unfair labor practice charge against petitioner Miller on December 13, 1977;[3] the Board's General Counsel issued a complaint based upon the charge on August 11, 1978.[4] Following a trial in January of 1979, Administrative Law Judge Hersel H.E. Plaine (the "ALJ") issued his decision on April 2, 1980.[5] The Board affirmed the findings of the

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[2] This court has jurisdiction under 29 U.S.C. §§ 160(e) & (f).

[3] Miller Appendix ("App.") at 2.

[4] *Id.* at 3-5.

[5] *Id.* at 21-49.

ALJ and adopted his order with modifications on January 14, 1981.[6] A summary of the ALJ's findings follows.[7]

On the morning of November 1, 1977, Miller management called a meeting with stewards from the machinists' and electricians' unions. Stewards Treichel and Szewczuga were present for the electricians.[8] Company officials informed the stewards that the company had decided to assign certain disputed work to the machinists, although the work had previously been assigned to an outside group of electricians.[9] The representatives of both unions responded to the announcement with heated displeasure, and said that it might produce "trouble," in the sense of employee dissatisfaction. Neither the company officials nor the union officials foresaw at this time that the decision might prompt any interruption of work.[10] Stewards Szewczuga and Treichel, after leaving the meeting, informed a higher union official, Henry Carrera, of the company's decision, and proceeded to their respective shops to inform the rank and file.[11]

Steward Treichel received an angry response from his fellow electricians: they expressed dissatisfaction with their union and their stewards and threatened to leave work to go to the union hall.[12] Treichel called union rep-

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[6] Miller Brewing Co., 254 N.L.R.B. No. 24 (1981), App. at 7-20.

[7] The findings of the ALJ are supported by substantial evidence. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). *See infra* part III A.

[8] App. at 28.

[9] *Id.* at 27-28.

[10] *Id.* at 28-29.

[11] *Id.* at 29.

[12] One reason for the strong reaction of the electricians to the news of this work-assignment decision was that the electricians had lost similar work-assignment disputes to the machinists in the past. App. at 25-26.

resentative Carrera again to inform him of the threatened work stoppage. Carrera advised Treichel to try to keep the men at work while Carrera attempted to discuss the situation with Miller officials, and to keep the men together as a group if Treichel was unable to prevent the electricians from going to the union hall.[13] Treichel attempted to persuade the men in his shop that leaving work would be the wrong thing to do. After leaving the shop for a short meeting with steward Szewczuga and a third steward, Ted Collins, Treichel returned to his shop and found that the rank and file had firmly decided to leave work despite Treichel's admonitions. Treichel then sought out a Miller supervisor and informed him of the impending walkout, and said that he, Treichel, would have to accompany the men.[14] Treichel was the first of the electricians in his shop to punch out, but he was the last to leave.[15] At no time did he direct anyone to stop work or to leave the plant.[16]

Steward Szewczuga found the electricians in his shop equally irate. The men accused the stewards and the union of failing to do their job. Szewczuga responded that the stewards were doing their best, and told the men that union representative Carrera would take the proper action regarding the work-assignment decision.[17] After a meeting with the other two electrician stewards, Szewczuga was returning to his shop when he received a telephone call; an anonymous caller told Szewczuga that the electricians were going to the union hall and that they wanted the stewards to be there.[18] When he reached

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[13] App. at 29.

[14] *Id.* at 30.

[15] *Id.* at 32.

[16] *Id.* at 30, 31.

[17] *Id.* at 33.

[18] *Id.* at 33-34.

the shop, Szewczuga found the men dressed in street clothes and ready to leave work. Szewczuga attempted to dissuade them from leaving, and asked that they stay at work at least until representative Carrera had had an opportunity to file an official grievance regarding the work-assignment decision. The men responded that they no longer believed in grievances.[19] Szewczuga tried unsuccessfully to reach Treichel and Carrera by telephone; he then determined that he should accompany his men to the union hall. While he was preparing to leave, two Miller officials confronted Szewczuga and warned him that a walkout would be a violation of the contractual no-strike clause, and that the participants might face discipline, including discharge. Szewczuga responded that he understood, but that he was unable to dissuade the men from leaving and that they wanted their steward at the union hall. Szewczuga punched out and was the last electrician to leave his shop. He did not direct any employee to leave the plant, and did not countermand any supervisor's order to remain at work.[20]

In a third shop, steward Collins and his group were the last electricians to learn of the work-assignment decision. Collins learned of the decision from Szewczuga and Treichel, and informed the men in his shop. The men reacted just as those in Szewczuga's and Treichel's shops had: they angrily resolved to leave work and go to the union hall to get an explanation of the work-assignment decision. Collins informed his supervisor that he was unable to persuade the men to remain at work, and that he intended to go with the men to keep order.[21] The supervisor called higher management officials, one of whom in turn called union representative Carrera, who came to the plant. Carrera met first with the Miller officials, and

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[19] *Id.* at 34.

[20] *Id.* at 34-35.

[21] *Id.* at 36.

then with the men in Collins's shop; Carrera was able to persuade the men to remain at the plant.[22]

After he succeeded in persuading the men in Collins's shop not to leave the plant, Carrera went to the union hall and met with the strikers from Szewczuga's and Treichel's shops. Carrera informed them that he had agreed with management upon a procedure by which the work-assignment dispute would be submitted to the NLRB, and that he had received tentative assurances from management that the punishment for the walkout would be mild. Carrera, with the aid of stewards Szewczuga and Treichel, who spoke in favor of the proposed solution, persuaded the men to return to work the next day.[23]

The work stoppage by the electricians in the three shops, all parties agree, was in violation of Article IX of the collective bargaining agreement between Miller and the electricians. Paragraph 5 of Article IX provides, in pertinent part:

> During the term of this Agreement, all disputes, grievances, complaints and adjustments pursuant to this Agreement shall be settled in accordance with the Grievance and Arbitration Procedure outlined herein, and the Union agrees for itself and its members that there shall be no strike of any kind, walkout, slow-down, picketing, stay-in, or work stoppage of any type. Should the Union, or any employee or group of employees violate the provisions of this paragraph, it is mutually agreed that the Employer may impose such disciplinary action against any or all employees involved as it may deem necessary, including discharge.

App. at 25.

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[22] *Id.* at 36-38.

[23] *Id.* at 38-39.

On November 15, 1977, after conducting an investigation,[24] Miller announced three levels of discipline for the participants in the November 1 work stoppage. First, the electricians in steward Collins's shop, who stopped work for three hours but stayed at the plant, received written reprimands and the loss of three hours' pay; Collins was docked for three hours' pay but received no reprimand. Second, the electricians in Szewczuga's and Treichel's shops who left the plant received reprimands and suspensions for three days without pay. Finally, stewards Szewczuga and Treichel—veteran employees of Miller with 26 and 12 years of service respectively—who accompanied the rank-and-file electricians on the walkout, were discharged, because of "participation in and leadership of" the walkout.[25]

When steward Collins, the only steward not discharged by Miller, learned of the discharges of Szewczuga and Treichel, he resigned as steward. Since then, union representative Carrera has been unable to persuade any of the electricians at the plant to serve as stewards.[26]

II. The Administrative Proceedings

Having made the findings that we have just summarized, the ALJ first considered and rejected Miller's contention that Treichel and Szewczuga had been discharged because they were leaders of the strike.[27] He further rejected the contention that Miller officials had a good faith belief that the two were leaders, even if they were not leaders in fact.[28] Instead, he concluded, Miller officials had equated stewardship with leadership of the

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[24] *See infra* p. 13.

[25] App. at 40.

[26] *Id.* at 42.

[27] *Id.* at 43.

[28] *Id.*

strike.[20] The ALJ found no evidence in the record to suggest that the parties to the collective bargaining agreement had agreed that union officials were to be held to higher responsibilities than the rank and file during unauthorized strikes.[20] Under existing Board precedent, he concluded, the selective discharge of the two stewards was an unfair labor practice.[21] His recommended order directed Miller to cease similar violations of the Act in the future, to offer to reinstate Szewczuga and Treichel with back pay from the date of their discharge, and to post appropriate notices.[22]

A divided panel of the Board affirmed the ALJ's findings and conclusions, although it modified the ALJ's remedial order in one respect.[23] Instead of ordering full

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[20] *Id.* at 42.

[20] *Id.* at 45.

[21] *Id.* at 44-46. *See, e.g.*, Precision Castings Co., 233 N.L.R.B. 183 (1977). The rule announced in *Precision Castings* has had a mixed reception in the courts of appeals. *See* Fournelle v. NLRB, 670 F.2d 331, 338-40 (D.C. Cir. 1982), and cases cited there.

[22] App. at 47-48.

[23] 254 N.L.R.B. No. 24; App. at 7-20. Chairman Fanning wrote for the majority. Member Jenkins concurred, but stated that he would not have reduced the back pay ordered by the ALJ by three days. App. at 15-17; *see infra* part IV. Member Pennello dissented on the ground that the stewards, as union officials, "had a higher duty than other employees to abide by and enforce the contractual no-strike provision." App. at 17-19.

Both the ALJ and the Board sought to distinguish Indiana & Michigan Elec. Co. v. NLRB, 599 F.2d 227 (7th Cir. 1979). The *Indiana & Michigan* decision denied enforcement of a Board order that found it a violation of the Act for an employer to impose disparate discipline on union officials who participated in, but did not lead, an unauthorized work stoppage. The ALJ noted that the collective bargaining agreement in *Indiana & Michigan* imposed special duties on union officials durign unauthorized strikes, while the agreement

back pay from the date of the discharge of the two stewards, as the ALJ had recommended, the Board ordered back pay for the period by which the discipline given the stewards exceeded the discipline given to the rank and file.[34] This reduced the amount of back pay ordered by three days. Chairman Fanning explained that such a reduction was necessary to tailor the relief to the violation found.[35]

We now proceed to a consideration of the contentions made in the petitions for review.

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between Miller and the electricians did not. App. at 45 & n.15. The Board did not disapprove this reasoning, but was apparently troubled by certain language in the *Indiana & Michigan* decision suggesting that union officials have a "higher responsibility that accompanies [their] status," 599 F.2d at 230. The Board in this case thus added the additional argument that, even assuming that union officials may have such higher responsibilities as a result of their status alone, the conduct of stewards Treichel and Szewczuga was sufficient to discharge such responsibilities. *See* App. at 11.

The *Indiana & Michigan* case has been clarified by later decisions. The Seventh Circuit, in C.H. Heist Corp. v. NLRB, 657 F.2d 178, 182-83 (7th Cir. 1981), has interpreted *Indiana & Michigan* to require some contractual basis for a union official's higher responsibilities. The Third Circuit in Metropolitan Edison Co. v. NLRB, 663 F.2d 478, 482 n.1 (3d Cir. 1981), *cert. granted*, 50 U.S.L.W. 3974 (June 14, 1982), has disapproved the *Indiana & Michigan* case insofar as it suggests that union officials may be selectively disciplined even if there is no collectively bargained authorization for such punishment. This court's decision in Fournelle v. NLRB, 670 F.2d 331 (D.C. Cir. 1982), holds that an arbitral decision may be the source of higher responsibilities for union officials but does not hold that a union official's status alone may justify disparate punishment.

We do not address the Board's attempts to provide an additional distinction of the *Indiana & Michigan* case. The ALJ's distinction, based upon the absence of collectively bargained higher duties in this case, is sufficient. *See infra* part III B.

[34] App. at 7-8 n.1.

[35] *Id.* at 11-14. *See infra* part IV.

III. Miller's Challenges to the Board's Order

A. *Strike Leadership*

Miller presents two arguments concerning the stewards' alleged leadership of the strike: first, that the stewards were in fact leaders of the work stoppage,[36] and second, that discharge of the two stewards was permissible because Miller officials had a good faith belief that the two were leaders, even if they were not so in fact.[37] Both arguments lack merit.

As this court noted in *Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982), "Board precedent is clear that union officials who are strike leaders may be selectively punished." *Id.* at 340 n.18 (citing *Chrysler Corp.*, 232 N.L.R.B. 466 (1977); *J.P. Wetherby Constr. Co.*, 182 N.L.R.B. 690 (1970)). Strike leadership has been defined so as to include not only the initial incitement of a work stoppage, *see, e.g., NLRB v. Armour-Dial, Inc.*, 638 F.2d 51, 56 (8th Cir. 1981), but also actions giving "impetus and direction" to a strike. *Chrysler Corp., supra*, 232 N.L.R.B. at 474 (decision of ALJ).

Miller contends that the actions of stewards Szewczuga and Treichel constituted leadership of the walkout, because they "provided this 'spontaneous' walkout a certain order that was otherwise lacking."[38] Miller points to testimony in the record that the two stewards tried to keep order at the beginning of the meeting in the union hall,[39] that Szewczuga was requested to accompany his men to the union hall,[40] that the two stewards advised against including electricians on the second shift in the walkout, and that the two stewards did not immediately seek the assistance of

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[36] Miller Br. at 17-22.

[37] *Id.* at 22-25.

[38] *Id.* at 19.

[39] *Id.*; App. at 135.

[40] Miller Br. at 19; App. at 163.

management officials in ending the walkout.[41] All of this testimony, however, is consistent with the conclusion of the Board that "[t]he leadership which was exerted by Treichel and Szewczuga was not in causing the walkout, but rather in a futile attempt to quell the rising tide favoring the walkout."[42] Miller concedes that the stewards did not initiate the walkout.[43] To the extent that the stewards helped to keep the walkout orderly, they helped to bring about its speedy conclusion. Although they were not in close contact with management officials, they did contact Carrera, a higher union official, who advised them to stay with their men;[44] Carrera then worked wth management officials to limit the walkout to half a day's duration.[45] Miller's nonspecific assertion that neither steward "made a significant effort to deter any individuals from walking out"[46] is rebutted by credited testimony. Miller's arguments about strike leadership reduce, at bottom, to the proposition that the stewards "assumed a natural role of responsibility in ensuring that the walkout was orderly";[47] this argument essentially equates leadership with stewardship, and we reject it, just as the Board did.[48] The Board's conclusion that the stewards were not strike leaders is supported by substantial evidence, and we affirm it.[49]

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[41] Miller Br. at 20; App. at 182.

[42] App. at 11.

[43] Miller Br. at 22.

[44] App. at 29.

[45] *Id.* at 38-39.

[46] Miller Br. at 22.

[47] *Id.* at 22.

[48] App. at 43.

[49] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

Miller's second argument is that, even if the stewards were not in fact the leaders of the strike, Miller officials had a good faith belief that they were leaders, and so were entitled to discharge them. This argument fails in its initial premise: Miller officials did not have such a good faith belief. The management officials who conducted the post-strike investigation testified that they had no direct knowledge that the two stewards had incited or encouraged the walkout.[50] Instead, as the Board found, those officials treated the stewards as leaders simply because they were stewards.[51] Manager Jablonowski testified that he believed that the two were leaders simply because they had joined the walkout;[52] Manager Paulicivic testified that he assumed that because the stewards had transmitted the work-assignment decision to the rank and file, and because a strike had resulted, the stewards must have transmitted the decision "in such a way as to cause the walkout."[53] The Miller official who approved the discharges, Daniel Feinsinger, conceded in his testimony that the discharges were based upon the "obvious consideration that they were stewards."[54] The ALJ's finding, that Miller "acted on an assumption or belief, without foundation in and contrary to the fact,"[55] was supported by substantial evidence.[56]

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[50] App. at 41.

[51] *Id.* at 41-42.

[52] *Id.* at 41.

[53] *Id.*

[54] *Id.* at 42.

[55] *Id.* at 43.

[56] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). Because we find that the record supports the ALJ's conclusion that Miller lacked a good faith belief that the stewards were leaders, we need not address Miller's attempt to distinguish NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964), in which the Supreme Court held that an employer may not discharge

B. *Selective Discipline as an Unfair Labor Practice*

We have concluded that Szewczuga and Treichel did not lead the strike, and their discharges therefore cannot be justified on that basis. We now turn to Miller's attacks on the Board's interpretation of sections 8(a)(1) and (3). The Board determined that the collective bargaining process had not explicitly established higher duties for union officials during unauthorized strikes, and that in the absence of such explicit duties, selective discipline of the union officials was an unfair labor practice.[57] We affirm the Board's conclusion.

1. *Duties under the collective bargaining agreement*

In *Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982), this court held that "where the collective bargaining process has imposed higher duties upon union officials than the rank and file, the officials may be more harshly punished than the rank and file for their conduct in violation of the no-strike clause and an employer's selective discipline of the offending union official will not constitute an unfair labor practice." *Id.* at 341. *Fournelle* did not reach the question whether selective discipline could be an unfair labor practice if there were no such collectively

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an employee for a good faith but mistaken belief that the employee has engaged in misconduct, if the employee was engaged in protected activity. Because the stewards were engaged in an unprotected strike, Miller argues, the principle of *Burnup & Sims* is inapplicable, and a good faith belief in the stewards' leadership suffices to justify the discharge. *See* Complete Auto Transit, Inc., 134 N.L.R.B. 652 (1961). Were we to reach this argument, we would reject it because, as we conclude *infra* part III B, the discharges constituted impermissible discrimination against the protected right to seek and hold union office.

[57] *See supra* note 33.

bargained higher duties, and if the union official did not lead the unprotected strike. *Id.* at 338.[58]

The ALJ noted, and Miller does not contest,[59] that the no-strike clause of the collective bargaining agreement between Miller and the electricians "has no special undertaking that could be said to place a special or specific duty upon the stewards in connection with forbidden work stoppages. It simply provides that the Union agrees for itself and its members that there shall be no (forbidden) work stoppage."[60] This is what the court in *Fournelle* referred to as a "neutral" or "general" no-strike clause,[61] and hence is an insufficient waiver under *Fournelle*.

In *Fournelle*, the parties' permanent umpire had clearly interpreted the parties' collective bargaining agreement as imposing higher duties on union officials. We held that such a clear arbitral decision should be given effect as the authoritative interpretation of the agreement. The Board had therefore erred in ignoring the arbitrator's decision and concluding that the selective discipline of a union steward who participated in an unauthorized strike was an unfair labor practice.[62]

Miller noted at the hearing before the ALJ that an arbitrator had upheld the discharges of Szewczuga and Treichel; Miller did not make the arbitrator's decision a part of the administrative record, however. Nor, as the ALJ noted, did Miller "raise [the arbitral] result, or

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[58] The court noted in *Fournelle*, though, that selective discipline in such circumstances "may run afoul of sections 8(a)(1) and (3)," and cited the Third and Seventh Circuit cases upon which we rely here to enforce the Board's order. *Fournelle, supra*, 670 F.2d at 338 & n.15.

[59] Miller Br. at 32 n.17.

[60] App. at 45.

[61] 670 F.2d at 338.

[62] *Id.* at 341-45.

deferral to the arbitration, as a defense." [65] The decision in *Fournelle* was handed down after the conclusion of the administrative proceedings in this case, and indeed after the conclusion of the normal briefing of this case.[66] The question is what effect, if any, we should now give to the arbitrator's decision, in light of the intervening decision in *Fournelle*.

It is plain that we cannot simply decide at this point that the collective bargaining agreement should be interpreted to impose higher duties on union officials. The court in *Fournelle* stated that an arbitral decision, in order to be controlling, must provide a "clear indication of the meaning of the agreement." [67] There is no indication on the present record whether the arbitrator's award was sufficiently clear, or indeed if it rested on the ground that the collective bargaining agreement imposed higher duties on union officials.[68]

Miller requests, however, that this court remand these proceedings to the Board so that the arbitral decision can be placed in the record and considered by the Board in light of *Fournelle*. The Board and the stewards oppose this request, contending that section 10(e) of the Act, 29 U.S.C. § 160(e), precludes such a remand. Section 10(e) provides in pertinent part:

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[65] App. at 42 n.13.

[66] At oral argument, we directed the parties to file memoranda addressing the effect of the *Fournelle* decision on this case.

[67] 670 F.2d at 343 n.21.

[68] Miller's mention of the arbitrator's award in its brief states that the arbitrator determined "that the discharges were not contrary to the provisions of the collective bargaining agreement." Miller Br. at 14. The simple determination that the agreement does not *forbid* selective discipline would be insufficient to bring the case within the rule of *Fournelle* because, as we discuss below, without a valid waiver of union officials' rights to escape selective discipline, the Act itself forbids such selective discipline.

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. . . . If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings . . . and shall file its recommendations, if any, for the modification or setting aside of its original order.

Section 10(e) requires that we ask two questions: (1) was there a failure to raise an "objection" based upon the arbitrator's decision, and (2) was any such failure excused because of "extraordinary circumstances"? If the objection was raised, or if failure to raise it was excused because of extraordinary circumstances, then we may consider whether additional *evidence* relevant to the objection should be adduced before the Board.[87]

The argument that the arbitrator's decision might provide evidence of the meaning of the collective bargaining agreement was not raised before the Board. Miller contends that, because it argued before the Board in general terms that the stewards' discipline was contractually authorized, the argument based upon the arbitral award is not a new "objection" within the meaning of section 10(e).[88] We disagree. As this court stated in *Consoli-*

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[87] *Cf.* NLRB v. Donnelly Garment Co., 330 U.S. 219, 234-35 (1947) ("The power to adduce additional evidence granted to the Circuit Court of Appeals by § 10(e) cannot be employed to enlarge the statutory scope of judicial review.").

[88] Miller Supp. Mem. at 4-5.

dated Freightways v. NLRB, 669 F.2d 790 (D.C. Cir. 1981), the "critical inquiry" in determining whether an objection has been presented to the Board for purposes of section 10(e) is "whether the objections made before the Board were adequate to put the Board on notice that the issue might be pursued on appeal." *Id.* at 794. In this case it is apparent that Miller gave the Board no hint that it considered the arbitral decision relevant to the question of contractual interpretation, or that the issue might be pursued on appeal.[69]

Since the objection was not raised, the next question is whether failure to raise it was "excused because of extraordinary circumstances." Miller argues that this court's decision in *Fournelle*, announced shortly before oral argument in the present case, constitutes an extraordinary circumstance.[70] Again, we disagree. The courts of appeals have generally held that intervening decisional law that suggests to a party a new ground for objection to a Board order is not an extraordinary circumstance within the meaning of section 10(e). *See, e.g., NLRB v. Newton-New Haven Co.*, 506 F.2d 1035 (2d Cir. 1974); *NLRB v. Pinkerton's National Detective Agency*, 202 F.2d 230 (9th Cir. 1953).[71] Miller relies on

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[69] *See* Building Material & Constr. Teamsters Union Local 216 v. NLRB, 520 F.2d 172, 179 n.8 (D.C. Cir. 1975).

[70] Miller Supp. Mem. at 9.

[71] In the *Newton-New Haven* case, the Second Circuit was asked to remand the proceedings to the Board for reconsideration in light of an intervening Second Circuit case, which held that procedures like those used by the Board in *Newton-New Haven* were invalid. The procedural objection had not been raised before the Board. The court held that the intervening decision was not an extraordinary circumstance within the meaning of section 10(e). 506 F.2d at 1038.

In the *Pinkerton's* case, the Ninth Circuit held that its own intervening decision regarding the validity of certain contract terms, a decision under whose rule the Board in *Pinkerton's*

the Fifth Circuit's decision in *NLRB v. Robin American Corp.*, 667 F.2d 1170, 1171 (5th Cir. 1982), in which the court held that an intervening Supreme Court decision that overruled a "previously controlling" Fifth Circuit doctrine was an extraordinary circumstance justifying remand. The court noted, however, that it reached this result only because, at the time of the administrative proceedings, it would have been "futile, if not frivolous" to present an appropriate objection, given the previously controlling Fifth Circuit precedent.[72] The court suggested that the simple pronouncement of an intervening "new doctrine" would not constitute an "extraordinary circumstance" under section 10(e), and cited the *Newton-New Haven* and *Pinkerton's* cases, *supra*, for comparison.[73]

It is apparent that the present case is quite different from the *Robin American* case. The *Fournelle* decision did not overrule any previously controlling precedent that would have made an objection based on the arbitrator's award futile or frivolous. *Fournelle* holds that certain arbitral awards must be given effect as the authoritative interpretation of the no-strike clause. But the Board has had, since *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955), a policy of deferral to arbitration awards in appropriate circumstances. *See Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974). Miller might have argued for such deferral in this case, but did not do so. Such an attempt

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should perhaps have reached the opposite result, was not an extraordinary circumstance justifying remand, when an appropriate objection had not been presented to the Board. 202 F.2d at 232-33.

See also NLRB v. Good Foods Mfg. & Processing Corp., 492 F.2d 1302, 1305-06 (7th Cir. 1974); Cascade Employers' Ass'n v. NLRB, 404 F.2d 490 (9th Cir. 1968). *But cf.* NLRB v. Lundy Mfg. Corp., 286 F.2d 424, 426 (2d Cir. 1960) (dictum).

[72] 667 F.2d at 1171.

[73] *Id.*

would clearly not have been futile or frivolous, even if *Fournelle* might now improve its chances of success. We conclude that Miller's failure to present an objection based on the arbitral award was not excused by extraordinary circumstances, and therefore we refuse to consider that objection now, and decline to remand to the Board.[74] We therefore proceed to decide this case on the record before us.[75]

2. *Selective discipline under the NLRA*

As we have already noted, the record contains no evidence that the collective bargaining process has imposed any special duties on union officials or that it has provided for selective discipline of union officials who engage in unprotected strikes. Instead, the collective bargaining agreement contains only a general no-strike provision stating that "the Union agrees for itself and its members that there shall be no strike of any kind," and that, in the event of a forbidden strike, "the Employer may impose such disciplinary action against any or all employees involved as it may deem necessary, including discharge."[76] It is well established that an employer may

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[74] Our refusal to consider Miller's untimely objection and our refusal to remand are based upon the special limitations on judicial review that Congress enacted in section 10(e), limitations that have been strictly interpreted. *See, e.g.*, NLRB v. Cheney California Lumber Co., 327 U.S. 385, 388-89 (1946). Different considerations may be controlling in other contexts. *Compare, e.g.*, United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952), *with* Hormel v. Helvering, 312 U.S. 552, 558-59 (1941).

[75] In enacting section 10(e), "Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested." NLRB v. Cheney California Lumber Co., 327 U.S. 385, 389 (1946).

[76] App. at 25.

discipline any or all of the participants in a contractually forbidden strike, as long as the discipline does not impermissibly discriminate against the employees' exercise of the rights protected by section 7 of the Act, 29 U.S.C. § 157.[77] *See Fournelle, supra*, 670 F.2d at 335-36 and cases there cited. The collective bargaining agreement between Miller and the electricians recognizes this general employer's prerogative. The question in the present case, however, is whether the *selective* discipline of union officials, without explicit collectively bargained authorization for that selective discipline, discriminates against the exercise of section 7 rights so as to violate sections 8(a)(1) and (3) of the Act. The Third and Seventh Circuits have addressed this question, and have held that such selective discipline violates the Act.

In *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478 (3d Cir. 1981), *cert. granted*, 50 U.S.L.W. 3974 (June 14, 1982), the court began with the indisputable premise[78] that the right to hold union office "is the essence of protected union activities," *id.* at 482 (citing *General Motors Corp.*, 218 N.L.R.B. 472, 477 (1975), *enforced mem.*, 535 F.2d 1246 (3d Cir. 1976)). The exercise of this right, the court reasoned, would be unreasonably restricted by allowing an employer the right unilaterally

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[77] Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157.

[78] *See* Radio Officers' Union v. NLRB, 347 U.S. 17, 39-40 (1954).

to impose selective discipline on union officials who participate in unprotected strikes:

> Allowing the discriminatory punishment that the Company imposed on [the union officers] might deter others from seeking union office because of the fear that, if an illegal strike were to occur, they would be put into an untenable position: either obey the company and lose their authority, or follow their own judgment and risk harsher punishment. It is because of this dilemma that we will not interpret a collective bargaining agreement to impose additional responsibilities on union officials absent clear language showing that the union agreed to it.

663 F.2d at 482-83 (footnote omitted). Therefore, the court held, the employer had violated the Act by giving disparately harsh suspensions to two stewards who refused to cross a picket line established by rank-and-file employees in violation of the no-strike clause.[79]

Similarly, in *C.H. Heist Corp. v. NLRB*, 657 F.2d 178 (7th Cir. 1981), the court held it "inherently destructive" of union members' rights to seek and hold union office for the employer to single out for discharge a union steward in the wake of an unprotected strike, when the collective bargaining agreement contained no provision of "higher responsibilities" for union officials during such strikes, and when the steward had sought to dissuade the other strikers.[80]

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[79] The court stated that its holding was consistent with its earlier decision in Gould Inc. v. NLRB, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, 449 U.S. 890 (1980), which held that union officials could be more harshly punished for participation in unprotected strikes if the collective bargaining agreement required those officials to take positive steps to help end such strikes. 663 F.2d at 482. *See also* Hammermill Paper Co. v. NLRB, 658 F.2d 155 (3d Cir. 1981).

[80] The court distinguished its earlier decision in Indiana & Michigan Elec. Co. v. NLRB, 599 F.2d 227 (7th Cir. 1979), which had upheld an employer's selective discipline of union

We find the reasoning of the courts in the *Metropolitan Edison* and *C.H. Heist* cases persuasive.[81] The selective discipline of union officials who are under no collectively bargained duty to take special measures to end unauthorized strikes may deter employees in the exercise of their protected right to seek and hold union office. We note, without resting our decision on the point,[82] that Miller's discharge of stewards Szewczuga and Treichel has had just such a destructive effect on employee rights: after the announcement of the discharges, steward Collins resigned his union post, and since then the union has been unable to persuade any of its members to serve as stewards.[83] The right of union officials to be free from selective discipline for participation in unauthorized strikes may be waived, *Fournelle, supra*, 670 F.2d at 338-41, but that does not mean that an employer may unilaterally increase the burdens associated with the holding of union office. Therefore we hold that an employer violates the Act by punishing union officials more harshly than the rank and file for their simple participation in conduct in violation of the no-strike clause, when the col-

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officials; the distinction rested on the ground that in the previous case there was a contractual basis, albeit a "tenuous" one, for the imposition of higher responsibilities on stewards. 657 F.2d at 182. *See supra* note 33.

[81] *Fournelle* disapproved the Third Circuit's conclusion in *Metropolitan Edison* that past arbitral awards cannot furnish a present indication of the meaning of the collective bargaining agreement unless the agreement explicitly provides that arbitral awards will be precedentially binding. *Compare Fournelle*, 670 F.2d at 343-45, *with Metropolitan Edison*, 663 F.2d at 483-84. That portion of *Metropolitan Edison* disapproved by *Fournelle* is irrelevant here.

[82] *See* Radio Officers Union v. NLRB, 347 U.S. 17, 51 (1954) ("subjective evidence of employee response" to employer discrimination is not required "where encouragement or discouragement can be reasonably inferred from the nature of the discrimination").

[83] App. at 42.

lective bargaining process[84] has imposed no special responsibilities or liabilities on union officials.

IV. The Stewards' Challenge to the Board's Order

The two stewards, who substantially prevailed before the Board, challenge only one aspect of the Board's order: they claim that the Board erred in refusing to award them full back pay to the date of their discharge. They argue that, because the Board found that "these two stewards could have done little else but what they did," the two stewards were not properly subject to *any* punishment, and that it was therefore inconsistent for the Board to limit the back pay remedy to the period by which the two stewards' discipline exceeded the three-day suspensions given to the other strikers.[85]

The simple answer to this argument is the one given by Chairman Fanning in his opinion for the Board: the Board's remedy wholly redresses the two stewards for that portion of the discipline that the Board found illegal.[86] The two stewards left work; in so doing they engaged in unprotected activity. The two stewards' attempts to persuade their fellow workers to stay at work did not make their own departure from work protected activity. They were thus subject to discipline, as long as that discipline was not imposed in a manner that discriminated against the exercise of the protected right to seek and hold union office. The Board, "in the exercise of its informed discretion," is entitled to deference in its use of the back pay remedy, "unless it can be shown that the order is a patent attempt to achieve ends other

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[84] The term "collective bargaining process" is used here in the sense that the *Fournelle* court gave it, to include certain arbitral results as well as the terms of the collective agreement reduced to writing.

[85] Szewczuga-Treichel Br. at 23-25.

[86] App. at 11-14.

than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). We find no reason to disturb the Board's order.

V. CONCLUSION

For the reasons set forth above, we enforce the Board's order in all respects. We reject Miller's contentions that the two stewards were strike leaders, that Miller believed in good faith that they were strike leaders, and that the Act permits the selective discharge of union officials in circumstances like these. We further reject the stewards' contention that the Board erred in failing to award them full back pay to the date of their discharge.

It is so ordered.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 30-CA-4468

MILLER BREWING COMPANY

and

ERVIN SZEWCZUGA AND GERALD TREICHEL, Individuals

DECISION AND ORDER

On April 2, 1980, Administrative Law Judge Herzel H. E. Plaine issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.[1]

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1. The Administrative Law Judge recommended that the two discriminatees be given backpay beginning with the date of their discharge, November 15, 1977. However, the rank-and-file employees who left the plant were given 3-day suspensions on the same date. Therefore, the remedy is revised to make whole the discriminatees to the extent that the discipline imposed against them exceeded that given to the rank-and-file. The recommended Order and notice are revised accordingly.

In reaching his Decision the Administrative Law Judge relied on our prior decisions in *Precision Castings Co.*,[2] *Gould Corp.*,[3] and *Indiana and Michigan Electric Co.*,[4] for support. Respondent's exceptions raised the question of the validity of *Indiana and Michigan, supra*, as precedent in light of the Seventh Circuit's refusal to enforce the Board's Order. We do not read the Seventh Circuit's opinion as placing absolute liability on union stewards and further find that the factual distinctions between that case and the instant case place this case outside the reach of its precedential impact.

In *Indiana and Michigan Electric, supra*, the court found that 50 bargaining unit employees walked off their jobs and left the employer's premises in violation of a contractual no-strike clause. Five union officials falsely advised their supervisors that they were ill and left with the other strikers. Three of the five union officials later assisted in ending the strike. As a result of this unlawful activity the employer issued written warnings to the rank-and-file strikers, suspended for 1 day the three stewards who helped to end the walkout, and suspended for 3 days the two officials who took no action to terminate the strike. The court reasoned that union officials have a higher responsibility than other employees not to engage in conduct which violates their duties as employees and repudiates their responsibilities as union officials. The court found that the employer's action in disciplining the union officials more severely than the other strikers did not violate

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2. *Precision Castings Company, Division of Aurora Corporation, a wholly owned Subsidiary of Allied Products Corporation*, 233 NLRB 183 (1977).

3. *Gould Corporation*, 237 NLRB 881 (1978), enforcement denied 612 F.2d 728 (3d Cir. 1979).

4. *Indiana & Michigan Electric Company*, 237 NLRB 226 (1978), enforcement denied 599 F.2d 227 (7th Cir. 1979).

the Act because it was "entitled to take into account the Union official's greater responsibility and hence greater fault."[5]

In the instant case, Stewards Treichel and Szewczuga were informed by Respondent of a work assignment decision which they knew would upset their membership. Their initial response was to contact Union Business Representative Carrera to inform him of the decision, to register their disagreement, and to seek his help in investigating methods by which the decision might be reconsidered. The stewards agreed that the best course of action was to wait until the newly assigned employees began the disputed work and thereupon file a grievance in accord with the contract procedure. In keeping with past practice, the stewards informed their fellow electricians about this most recent decision. However, the angry reaction which this news elicited exceeded their expectations and talk of a walkout began immediately. The employees' anger was directed not only at Respondent for its decision, but also at the stewards and the Union for their inability to represent successfully their interests. The rank-and-file strikers wanted to go to the union hall to find out why they so often came out on the losing end. Both stewards tried to calm their men and Treichel contacted Carrera for further advice and assistance in restoring order. During this conversation, Carrera told Treichel to continue to try to calm the men and to keep them inside the plant, but if the employees insisted on coming to the union hall, to keep them together as a single group. Following this advice both stewards attempted to convince the employees that the matter was being pursued through the appropriate channels and that they should return to their jobs and allow the process to work. Despite their continued efforts, the employees refused to be pacified. When

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5. *Indiana & Michigan Electric Company, supra* at 232.

it became apparent that the employees were determined to leave, Treichel and Szewczuga each notified supervisory personnel about what was happening. As their men exited the plant, the stewards observed Carrera's instruction to keep their men together and followed them out. Thereafter Respondent issued letters of reprimand and temporary suspensions to the rank-and-file strikers, but discharged Treichel and Szewczuga for "participation in and leadership of the walkout." While acknowledging that it has no basis for believing that either Treichel or Szewczuga incited, suggested, or encouraged the walkout, Respondent asserts that Treicel and Szewczuga, by virtue of their union stewardship positions alone, were leaders in the unlawful strike and thereby deserved the harsher discipline.

The facts of this case clearly portray a situation where these two stewards could have done little else but what they did. They were caught in a series of events whereby an employer's decision provoked a hostile, and ultimately uncontrollable, reaction against the Employer, the Union, and themselves. Credited testimony reveals that at each step in the situation's progress, they attempted to restore order, to persuade their men to remain on the job, to seek assistance from others in the Union, and to apprise Respondent truthfully about what was happening. Both the union business representative and their men wanted the stewards to accompany the rank-and-file to the union hall. The leadership which was exerted by Treichel and Szewczuga was not in causing the walkout, but rather in a futile attempt to quell the rising tide favoring that walkout. Based on these findings, the Seventh Circuit's characterization of a steward's "greater responsibility and hence greater fault" is inapplicable herein and we agree with the Administrative Law Judge's determination that

Respondent's imposition of more severe discipline on the stewards violates Section 8(a)(1) and (3) of the Act.

Contrary to Member Jenkins, the remedy provided herein is fully appropriate and in accord with the traditional remedies imposed by the Board. The Chairman views his disagreement with Member Jenkins to be less a difference over remedy than one over the nature of the violation found.

At the outset, it is important to note exactly what conduct has been found violative of the Act. Here, we are affirming the Administrative Law Judge's finding that Respondent unlawfully imposed a "*greater* discipline" (emphasis supplied) on union stewards than that imposed upon rank-and-file employees who also participated in the unprotected walkout. In this case, as in *Precision Castings* and its progeny, the very heart of the Board's rationale is that an employer may not rely on union-related considerations to justify a more severe discipline for stewards. However, an employee's status as a steward does not insulate him or her from the lawful discipline imposed upon all employees. Thus, in these circumstances, the violation directly results from the additional penalty imposed on a steward by an employer. For that violation, a proper remedy must be provided.

In the Chairman's view, the remedy advocated by Member Jenkins fails to correlate with the violation found. In this case, inasmuch as the walkout was unprotected, Respondent could and did lawfully discipline those employees who participated in the walkout. Thus, to the extent that all electricians—including the stewards—who participated in the walkout received a 3-day suspension without pay, Respondent's discipline was lawful. However, Respondent's imposing a greater discipline upon

the union stewards was unlawful, and the stewards are therefore entitled to be made whole to the extent that their discipline exceeded that found lawful.

Should the litigation raise, and leave otherwise unresolved, any doubt whether the total discipline or only an additional discipline was imposed upon an employee for discriminatory reasons, Chairman Fanning would resolve that doubt against the wrongdoer. *The American Distilling Company*[6]—cited by Member Jenkins—involved just such a situation. There, an employee, who was also the union president, was suspended for 90 days for violating a work rule. No other employee had ever been suspended for more than 30 days for the same offense, and the Board found that the employee received the greater discipline because he was the union president. The case did not involve a group of employees engaging in the same conduct at the same time (e.g., such as the unprotected walkout herein) and for which union stewards received a greater penalty. In *American Distilling*, as it was uncertain what penalty, if any, the employee would have received absent union considerations, the employer's entire discipline violated the Act and it was fully proper that the remedy included backpay for the full 90-day suspension. But, when litigated on the theory of disparate punishment and the facts clearly show that all employees similarly situated received the same lawful discipline except that the union stewards received a greater discipline because of their position, the violation found must be that the *additional* penalty violated the Act and a remedy provided for the discrimination actually suffered.[7]

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6. 245 NLRB No. 148 (1979).

7. See, e.g., *Westinghouse Electric Corporation*, 243 NLRB No. 44 (1979).

Certainly, in analogous situations, though it is clear that a discriminatory act has taken place, the Board nonetheless limits a remedy to fit the violation. For example, when an employee is discharged or laid off for discriminatory reasons, the make-whole remedy will be limited if it can be shown that the employee later would have been terminated or laid off for nondiscriminatory reasons.[8] Here, by imposing a remedy which makes whole the discriminatees to the extent their discipline was unlawful, the Board is recognizing the nature and extent of the violation found and fulfilling its function to fashion a proper remedy.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Miller Brewing Company, Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a) of the recommended Order:

"(a) Make whole Ervin Szewczuga and Gerald Treichel, with interest, for any loss of earnings incurred as

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8. See, e.g., *Ohio Valley Graphic Arts, Inc.*, 234 NLRB 493 (1978). In that case, an employer, for discriminatory reasons, accelerated the discharge of an employee, whom it would have lawfully discharged 6 days later. In fashioning a remedy, the Board did not order reinstatement. Rather, the Board directed the employee be awarded backpay for the 6 days by which his discharge preceded the date, absent unlawful considerations, upon which he would have been lawfully discharged. Thus, the Board precisely tailored the remedy so as to make whole the discriminatee only to the extent the employer's action was unlawful.

a result of the discriminatory discipline. Said interest shall be computed as set forth in the remedy section of this Decision."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. January 14, 1981

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John H. Fanning, Chairman
(Seal) National Labor Relations Board

MEMBER JENKINS, concurring:

I agree with the remedy provided herein, but, in addition, I would order a complete make-whole remedy, providing backpay to Szewczuga and Treichel for the entire length of their discriminatory discharges, beginning November 15, 1977. The limited remedy fashioned herein represents an unwarranted departure from the Board's traditional remedies in disparate treatment cases.

It is the Board's function to remedy the effects of an unfair labor practice and to restore the *status quo ante*. It is neither the purpose nor the design of an unfair labor practice proceeding for the Board to assume the role of an arbitrator, meting out what it considers to be appropriate discipline when it finds that a respondent's discriminatory action has resulted in inappropriately severe discipline. Rather, the Board's obligation to remedy the effects of the unlawful conduct actually committed is not affected by the fact that a respondent lawfully could have imposed less severe discipline upon a discriminatee.

A simple illustration demonstrates the folly inherent in the remedy herein. In a typical disparate treatment case, the prounion employee receives greater discipline for

the same offense than does the nonunion employee. If the violation is found, the Board orders a complete make-whole remedy; we do not reduce the discipline or alter the nature of it.[9] Indeed, the Board has applied its traditional make-whole remedial approach in cases similar to the instant case. For example, in *The American Distilling Company*, 245 NLRB No. 148 (1979), a union official was suspended for 90 days for misconduct for which rank-and-file employees had received suspensions ranging from 1 week to 30 days. The Board ordered that the discriminatee be given backpay for the full term of the suspension imposed by that respondent, not for some lesser period over and above that which may have reflected a nondiscriminatory suspension. Thus, it has never been the Board's function to administer discipline fairly for those employers who administer it discriminatorily. If the Board ventures into this area of formulating "appropriate" levels of discipline, its processes will be steeped in an analytical mire of disciplinary systems and efforts to find the appropriate level where nonunion employees are disciplined to different degrees, all consuming great amounts of time, and resulting in arbitrary and unpredictable remedies for discriminatees. Simply stated, if Respondent's conduct is found unlawful, the Board may not ameliorate the effects of the unlawful conduct by, in effect, imposing lesser discipline on the discriminatees. Accordingly, I would order the traditional make-whole remedy.

Dated, Washington, D.C. January 14, 1981

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Howard Jenkins, Jr. Member
National Labor Relations Board

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9. See, e.g., *Windsor Plastics, Inc.*, 231 NLRB 1222 (1977).

MEMBERS PENELLO, dissenting:

Contrary to my colleagues, I would reverse the Administrative Law Judge and dismiss the complaint in this case. Once again I must reiterate my continuing disagreement with the majority's conclusion that it is a violation of the Act for an employer to discipline union officials more severely than other employees for breaching their duty to enforce the contract by participating in a strike in violation of a contractual no-strike provision.[10] Furthermore, I note that this case arose within the Seventh Circuit, which has clearly indicated that it considers the majority's analysis of the law in such cases to be erroneous.[11] Inasmuch as I find the majority's attempts to distinguish the facts in this case from those in the *Indiana & Michigan* case singularly unconvincing, I would follow that precedent, which coincides with my analysis of the law in this area. Thus, I would find that Respondent did not violate Section 8(a)(3) and (1) of the Act by disciplining Charging Parties Szewczuga and Treichel more severely than other employees who participated in the unprotected strike, because as union officials they had a higher duty than other employees to abide by and enforce the contractual no-strike provision.

It is undisputed that the walkout of Respondent's first-shift electricians on November 1, 1977, violated the no-strike clause of the contract and was thus unprotected. It is also undisputed that Stewards Szewczuga and Treichel walked out of the plant with the other electricians, despite

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10. See my dissenting opinion in *Gould Corporation*, 237 NLRB 881 (1978), enforcement denied 612 F.2d 728 (3d Cir. 1979), and my concurring opinion in *Midwest Precision Castings Company*, 244 NLRB No. 63 (1979).

11. See *Indiana & Michigan Electric Company v. N.L.R.B.*, 599 F.2d 227 (7th Cir. 1979), denying enforcement of 237 NLRB 226 (1978).

requests by Respondent's officials that they remain on the job, and went with the striking electricians to the union hall. By this conduct, they clearly joined and participated in the illegal strike. While Szewczuga and Treichel also took some steps to prevent the walkout and to end it after they were unsuccessful in forestalling it, their conduct in walking out with the striking employees was inconsistent with their attempts to prevent the strike and breached their duty to enforce the contract. In light of their positions of authority within the Union, they would logically be viewed by the employees as leaders in any strike situation. Their actions in walking out along with the other employees thus spoke louder than their words, effectively demonstrating their tacit approval of the employees' strike and undermining the Union's contractual no-strike commitment.

For the reasons set forth in my dissenting opinion in *Metropolitan Edison Company*, 252 NLRB No. 147 (1980), I would find that, regardless of the actions taken by Szewczuga and Treichel to end the strike, they nevertheless breached their primary responsibility as union officials to enforce the contract by participating in a strike which violated the no-strike clause of the contract. Therefore, I would find that Respondent acted lawfully in holding them to a higher standard of conduct and disciplining them more harshly than other employees who participated in the illegal strike. Accordingly, I dissent.

Dated, Washington, D.C. January 14, 1981

.....

John A. Penello, Member
National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge employees or discriminate against them in regard to their hire, tenure, or any term or condition of employment, because of their protected concerted activities or because they hold union office in the bargaining unit when engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL give Ervin Szewczuga and Gerald Treichel backpay with interest to compensate for any loss of earnings they incurred as a result of the discriminatory discipline.

WE WILL offer to both said employees immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

Miller Brewing Company

.....

(Employer)

Dated ..... By .....

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Commerce Building, Suite 230, 744 North Fourth Street, Milwaukee, Wisconsin 53203, Telephone 414—291—3866.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 30-CA-4468

MILLER BREWING COMPANY
Respondent

and

ERWIN SZEWCZUGA and GERALD TREICHEL,
Individuals
Charging Parties

Rocky L. Coe, Esq.,
Milwaukee, WI,
for the General Counsel.

Patrick W. Schmidt, Esq. and
Laurence E. Gooding, Jr., Esq., of
Quarles and Brady,
Milwaukee, WI,
for the Respondent.

Kenneth R. Loebel, Esq., of
Goldberg, Previant and Uelmen,
Milwaukee, WI,
for the Charging Parties.

DECISION

HERZEL H. E. PLAINE, Administrative Law Judge:

This case is concerned with the discharge of the Charging Parties, two electrician employees of the Respondent, who were stewards for Local 494, International Brotherhood of Electrical Workers, AFL-CIO-CLC (IBEW or the Union), in connection with a wild-cat walkout to

the IBEW union hall, on November 1, 1977, of most of the first shift electricians employed at Respondent's Milwaukee brewery, in contravention of the Union contract with Respondent abjuring strikes and walkouts in favor of settlement of disputes by the grievance and arbitration procedures of the contract.

The work stoppage was of several hours duration. It was a mixed reaction of the electricians to what they regarded as management favoritism toward Machinist Union (IAM) employees in reversing, on November 1, a prior management decision and awarding to machinists certain Filtec work (see note 2 *infra*) being performed by electricians, and the seeming inadequacy of their IBEW Union representation, under the contract grievance procedure, to hold on to work performed by the electricians. Only the two Union stewards were punished by discharge. The other participating employees were disciplined by up to a three-day loss of pay and reprimand in their files.

The complaint alleged,[1] and General Counsel contends, that the discharge of the two stewards was discriminatory, imposed on them alone because of their Union status as stewards, in violation of Section 8(a)(3)and (1) of the National Labor Relations Act (the Act).

The Respondent claims that the discharge of the two employees was not solely because of their status as Union stewards, but rather because of their active leadership of the employees in the work stoppage and walkout, and therefore constituted justified action to discourage leadership in breach of the contract obligation.

The case was tried before me on January 15, 16 and 17, 1979, at Milwaukee, Wisconsin. All three parties have filed briefs.

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1. The charge was filed on December 13, 1977.

Upon the entire record of the case, including my observation of the witnesses and consideration of the briefs, I make the following:[2]

Findings of Fact

I. Jurisdiction

Respondent is a Wisconsin corporation that operates breweries and related facilities throughout the United States, including the brewery in Milwaukee involved in this case.

In the year prior to issuance of the complaint, a representative period, Respondent realized gross revenues in excess of $500,000 from its operations and shipped and received goods valued in excess of $50,000 to and from points outside Wisconsin.

As the parties admit, Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

As the parties also admit, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. *Respondent's Business Operations*

Respondent's Milwaukee brewery, the facility involved in this case, is a collection of buildings where beer is brewed and packaged in bottles, cans, and kegs.

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2. Throughout the Transcript of the Record the phrase "fill tech" should be corrected to read "Filtec" (the descriptive or trade name of the inspection reject device used to measure the adequacy of the liquid fill or level of bottles and cans in the process of packaging beer and to reject partly filed [(sic) filled] bottles or cans); and reference to the "McGraw" company or electricians should read "McGraw" company or electricians.

According to Joe Paulicivic, who was Respondent's labor relations manager for the Milwaukee brewery in November 1977 and earlier, Respondent's employees were variously affiliated with twelve labor unions. The employees of direct concern were electricians, members of the IBEW (the Union), who constitute a segment of the maintenance force in the brewing packaging departments.

The electricians provided coverage for the brewery's three shifts, with about 28 men on the first and predominant shift, and about 6 men each on the second and third shifts. The first shift hours were from 7 a.m. to 3:30 p.m.

Most of the buildings comprising the brewery are in groups with some inside interconnections within each group, but only exterior ingress and egress between the several groups. The main dividing line between the groups is State Street (running east and west) so that the buildings, denominated by numbers, are usually described as north or south or on the north side or south side (of State Street).

The electricians work out of three electric shops. One is located on the third floor of north building 29, sometimes called north bottling, which is part of the group of north side buildings concerned with packaging (see exhibit R-6).

A second electric shop is on the first floor of south building 60, sometimes called south bottling, which building, along with south building 61, comprise the south packaging plant (see exhibit R-6).

A third electric shop is on the first floor of south building 15, which building is concerned with brewing (see exhibit R-6).

In connection with the three electric shops, for the first and predominant shift the Union business agent had appointed from among the electricians three stewards, one for each shop. One of the stewards was Ervin Szewczuga (referred to as Erv in the testimony), an employee of Respondent for 26 years, who had been serving as steward for 4 years of the electric shop in north building 29. For the electric shop in south building 60, the appointed steward was Gerald Treichel (referred to as Gerry in the testimony), an employee for 12 years and steward for 4 years. For the electric shop in south building 15, the appointed steward was Theodore Collins (referred to as Ted in the testimony), an employee for 22 years and steward for about 3 years.

Among the supervisory and management personnel involved in the events of this case were Paul Jablonowski, then packaging maintenance manager; Joe Paulicivic, then labor relations manager for the Milwaukee brewery; Daniel Feinsinger, industrial relations division (IRD) manager for the Milwaukee brewery, to whom Paulicivic reported; Resident (or Plant) Manager Fred Mundt, to whom Feinsinger reported; Corporate Manager of all Industrial Relations Departments Koenig; Supervisor Edward Beers, who was an electrical and mechanical maintenance supervisor in south packaging, and supervisor Gary Grande, who who was an electrical maintenance supervisor in north packaging.

B. *The Union Contract*

Local 494 IBEW (the Union) has represented the electricians employed at Respondent's Milwaukee brewery between 30 and 40 years, according to Union Business Representative Henry Carrera. Carrera had been business representative for almost 10 years at the time of trial.

The latest and current 3 year contract, which is a contract of the Union with the Pabst and Schlitz Milwaukee breweries as well as Respondent's Milwaukee brewery, became retroactively effective on October 1, 1977 after being ratified by the parties on October 31 and signed November 11, 1977,[3] and runs to October 1, 1980.

The pertinent "no strike" provision of the contract is Article IX, para. 5, which reads as follows:

ARTICLE IX

GRIEVANCE AND ARBITRATION PROCEDURE

5. During the term of this Agreement, all disputes, grievances, complaints and adjustments pursuant to this Agreement shall be settled in accordance with the Grievance and Arbitration Procedure outlined herein, and the Union agrees for itself and its members that there shall be no strike of any kind, walk-out, slow-down, picketing, stay-in, or work stoppage of any type. Should the Union, or any employee or group of employees violate the provisions of this paragraph, it is mutually agreed that the Employer may impose such disciplinary action against any or all employees involved as it may deem necessary, including discharge. The Employer agrees that there shall be no lock-out on its part. It is agreed that any dispute arising under Paragraph 5 shall be disposed of through the Grievance and Arbitration Procedure set forth in this Article IX.

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3. The prior contract had expired October 1, 1977 but was extended for another month while negotiations continued.

C. *The Filtec Dispute and Prior Disputes History*

For years, the electricians, represented by IBEW, and the machinists, represented by District 10 of the International Association of Machinists etc. (IAM), had been vying for jurisdiction over items of in-plant work.

A prime example, with origins going back many years, was the repair of electrical parts on battery-operated fork-lift trucks used in and about the plant. Although in 1958 the electricians had been awarded the work by Respondent involving what was then a very few such electric trucks, in 1973 when Respondent acquired a large fleet of them it assigned the work to an internal vehicle repair shop operated by the machinists. The electricians in 1974 took Respondent's assignment to arbitration, and in 1975 the arbitrator ordered Respondent to assign the work to the electricians. Nevertheless, as many of the employee witnesses testified and Labor Relations Manager Paulicivic conceded, Respondent refused to assign the work to the electricians and instead cooperated with the machinists (who to meet technical requirements threatened a work stoppage) in having the matter brought to the Board for determination under Section 10(k) of the Act. In 1976, the Board, relying heavily on Respondent's preference for the machinists (noting that both crafts were equally suited by background, practice, and skills), awarded the work to the machinists, *International Ass'n of Machinists, District 10*, 222 NLRB 688, 689-690 (1976).

This episode, as did others involving contest with the machinists and work decisions prior to November 1977, soured the views of the electrician employees concerning the impartiality of Respondent's management and supervisors, and fostered a belief that management was siding with the machinists. The belief was fed by employee

understanding that some of the supervisors of the electrical and mechanical departments came from machinists backgrounds, for example Beers, Jablonowski, and a Gene Salkowski, and that there was no electrician in the relevant management (see testimony of electrician employees Liske, Rutz, and Collins among others, and testimony of Jablonowski and Beers indicating previous machinists ties).

The disenchantment of the electricians, according to electrician Liske a 16 year employee, extended not only to their employer but also to the Union representatives and stewards who, said Liske, appeared to be only losing in the grievance procedure over work previously done by electricians. Among some of the other disputes that the electricians lost was the refusal of the machinists to allow electricians use of certain company tools, for which Maintenance Manager Jablonowski first gave a promise to correct but then repudiated under machinists' pressure (testimony of electrician Szewczuga); removal of motors from gear heads (testimony of electricians Liske and Rutz); a matter concerning brackets in July 1977, as to which Szewczuga said he had persuaded his fellow electricians to refrain from walking out; and lastly, the dispute over the Filtec work, which precipitated the work stoppage of November 1, 1977.

The Filtec, an inspection reject device in packaging to determine the liquid level in containers (see note 2, *supra*), was going through a process of replacement in the plant. The old style, mainly on the bottle lines, uses an optical system that passes a beam of light through the bottle and senses the difference in light refraction to determine the fill level of the liquid. The replacement style, useable for packaging cans as well as bottles, passes a beam of radiation through the can or bottle to sense the liquid level by differentiation of the density. Appar-

ently, the new style Filtec is more electronically oriented than the old style. The gradual process of replacing the old with the new had begun when the dispute between the electricians and machinists erupted at the end of October 1977.

The installation of the new Filtec system, in various locations, involved three parts, namely, installing

(a) the totalizer,

(b) the inspection head, and

(c) the reject conveyor.

The work had been divided between the electricians and the machinists, and, as electrician steward Szewczuga testified, there had been agreement between the contesting sides that electricians would install item (a), the totalizer, and machinists would install item (c), the reject conveyor. There had been no agreement on installing item (b), the inspection head.

In October 1977 or earlier, Respondent had engaged an outside electrical contracting firm, the McGaw Company, whose employees are IBEW electricians, to do the mounting of the inspection heads; and in the last week in October 1977 McGaw electricians were working on four units on a dual line for quarts and 12-ounce bottles, which work included bolting the inspection head to the floor and insuring that it was level to the conveyor.[4]

On October 24, 1977, according to Labor Relations Manager Paulicivic, the McGaw electricians were told to stop work, as a result of the machinists' complaint (with

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4. Electricians Szewczuga, Rutz, and others of Respondent's electricians testified that they had no objection to, or problem with, the work being done by the outside electricians who were fellow members of their Union.

overtones of a strike threat) that the electricians were doing the machinists' work. On October 26, Paulicivic called a meeting that included electrician stewards, Szewczuga and Treichel, and two machinist stewards, White and Lysek, and told them that Respondent had decided to have the McGaw electricians continue with the Filtec work assigned to them. Paulicivic claimed, at trial, that this was merely a temporary decision, but electrician stewards Szewczuga and Treichel testified they understood this was a final decision. Paulicivic apparently contributed to the understanding or misunderstanding of the electrician stewards by not putting what he said had been decided in writing, and by asking only the machinist stewards at the meeting to supply some additional information. He testified that Packaging Maintenance Manager Jablonowski later suggested that he, Paulicivic, get some further information for the electricians through the project manager Brockmeyer in order to have the whole old history; and Brockmeyer came to electrician steward Szewczuga after the McGaw electricians resumed work on October 27 and (either inadvertently or intentionally) perpetuated the misunderstanding concerning the decision of October 26 by telling Szewczuga that he, Brockmeyer, was getting "heat" from the machinists and needed some information from the electricians to tell the machinists. Szewczuga supplied Brockmeyer with a letter or letters concerning earlier history.

It was therefore with a reply of surprise that Szewczuga was told by Paulicivic and Jablonowski on the morning of November 1, that they wanted a further meeting at 11 a.m. that morning with him and electrician steward Treichel and the two machinist stewards to "clarify" the Filtec decision of October 26. Szewczuga replied he thought the matter had been clarified on Octo-

ber 26. Nevertheless the meeting was held and Szewczuga and Treichel attended along with the machinists' and management representatives.

At the 11 a.m. meeting of November 1, Szewczuga for the electricians and White for the machinists were each handed a paper (exhibit GC-2), which reversed the October 26th decision, so that installation of the disputed item (b), the Filtec inspection head, previously awarded to the electricians, was now awarded to the machinists. The November 1 decision noted (what had not been in dispute) that electricians would continue to be responsible for wiring and adjustments of the inspection head as in the past, and stated also (what apparently had not been in dispute) that installation of the totalizer (item (a)) would be done completely by the electricians, and installation of the reject conveyor (item (c)) would be done by the machinists except for wiring by the electricians.

Packaging Maintenance Manager Jablonowski told the four stewards that the decision was final. He and Labor Relations Manager Paulicivic claimed that both the electricians and machinists representatives responded heatedly, the electricians because it was unfair to take from the electricians work they had been doing, the machinists because they had not also been given the installation of the totalizer (although there was contradictory evidence that they had agreed that this item would be done by the electricians, and Paulicivic conceded that the machinists filed no grievance over the assignment).

Manager Jablonowski testified that in the course of the discussion electrician Szewczuga said, it looks like to get anything here you have to be a rabble rouser. Jablonowski said he replied, don't go using self-help, you have a grievance procedure to follow. Szewczuga did not recall any reference to "rabble rouser." He was quite clear in his

testimony that he made no threats. In this regard, Jablonowski's further testimony was corroborative of Szewczuga, Jablonowski saying that he did not feel the rabble rouser remark was a matter of concern or that it indicated trouble, and that it was typical of remarks made in this and other meetings.[5]

Indeed, after the meeting ended at about 11:30 a.m., both Managers Jablonowski and Paulicivic went off to lunch, as they testified, without any foreboding of trouble, particularly interruption of work, at the plant.

D. *The Work Stoppage*

Following the forenoon meeting of November 1 on the Filtec installation assignments, electrician stewards Szewczuga and Treichel proceeded to the electric shop in north building 29 and telephoned the results of the Filtec meeting to Union Business Representative Henry Carrera. In essence they reported that Respondent had reversed its earlier decision of October 26 on electricians installing the Filtec inspection head and awarded the work to the machinists. According to the two stewards, Carrera said he would see what he could do about it. Carrera testified that he also told them that it looked like another jurisdictional dispute under the contract with Respondent, as in the electric forklift case, and he would look about for someone to argue the case for the electricians.

The two stewards decided that each would go back to his own shop for lunch but rejoin and see electrician steward Ted Collins in the south brewing department for any ideas he had, as a result of his participation in

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5. Labor Relations Manager Paulicivic was careful to point out that in the meeting neither electricians nor machinists used the term work stoppage, and that when they referred to "trouble," as a result of the assignment, they were talking of being extremely unhappy, not a work stoppage.

the most recent contract negotiation, for preparing or dealing with the Filtec grievance, and that if there was any need Treichel would be in touch with Carrera.

The Walkout from South Packaging

Leaving steward Szewczuga, steward Treichel went from north building 29 across the street to the electric shop on the first floor of south building 60, found no one there and went to the second floor lunchroom. From his testimony, it appeared that he found a good number of his fellow electricians and, eating his lunch, told them of the new and changed Filtec decision by Respondent and that Union Representative Carrera was going to work on it. He got an angry response, his fellow employees asking, why did they come out on the short end when he represented them, demanding that the Union tell them, and asserting that they were going down to the Union to find out. The discussion and participants moved to the electric shop now involving most of the electricians attached to the shop. Treichel managed to call and reach Carrera again at the Union hall and told him the men were talking of leaving and coming down to the Union hall on account of the Filtec decision. Carrera counseled that Treichel try to hold the men there while Carrera got in touch with the plant's Industrial Relations Department (IRD) to try and stop them; and added, as Treichel described it, if he couldn't hold them there to keep them together as a group if they were coming down to the Union hall.[6]

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6. Union Representative Carrera testified that he tried to reach Labor Relations Manager Paulicivic and his assistant Olsen and learned they were out to lunch, was told that IRD Manager Feinsinger was also out, and, leaving a message for Feinsinger to call him, went out to lunch himself. When he got back to his office just before 1 o'clock, Carrera got a call from Feinsinger to come to the plant at once and help deal with a chaotic situation of people leaving. He complied and arrived, he said, in about 15 or 20 minutes.

Coming back to his electricians, said Treichel, the sentiment appeared to be growing for going down to the Union hall. He testified that he told them it was the wrong thing to do, that Hank Carrera was going to work on the matter.

Steward Treichel put a call in to steward Szewczuga and learned that he had been getting the same angry reaction from his electricians but no indication of any action yet and, as prearranged, both decided to see steward Collins, and they met him briefly in south building 15 at or near the first floor electric shop, which services the south brewing department. As Collins related, they told him of the Filtec decision, that their fellow electricians were up in arms and wanted to go to the Union hall, that this would be contrary to the Union contract, and they didn't want this to happen. Szewczuga and Treichel asked Collins if there were any things in the recent contract negotiations or terms that would help in preparing a grievance, but the three quickly decided it would be best to let the machinists start the work and then file a grievance. The meeting was brief, and Szewczuga and Treichel departed for their buildings.[7]

Steward Treichel testified that when he returned to the electric shop in south building 60, he found that a consensus of his colleagues had hardened against his view that they stay, that they would not listen to him but were determined to leave for the Union hall, and began moving out of the electric shop to pack away their tools and change to street clothes. Treichel then sought out Supervisor Orville Witt, in his office, and told him that the electricians

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7. Electrician steward Collins thought that his discussion with the other two stewards was by a joint telephone call from both, but the others were quite clear it was a personal meeting, and I credit their testimony. There was no disagreement among the three as to what was said.

of the building 60 shop were determined to go to the Union hall and that he, Treichel, had to go with them. Treichel then went back to the electric shop, still in his work garb, punched out (the clock is in the shop), but did not leave, instead went to the locker room to change to street clothes. He said he told the men there, who were dressed to leave, that if they were going to the Union hall to stay together. He did not, said Treichel, direct anyone to stop work or to leave the plant.

Treichel testified that he then went back to the electric shop and, after his colleagues punched out and left, he followed behind them, Electrician Roland Liske immediately preceding him.

In connection with the foregoing testimony, two electricians who were part of the crew in south packaging testified. They were Roland Liske and Carl Rutz.

Electrician Liske testified that he had been in the second floor lunchroom of south building 60 starting at 11:30 a.m. and left for the first floor electric shop before (as he discovered later) steward Treichel had come into the lunchroom. When Treichel came into the electric shop at or shortly after noon and discussed the Filtec decision, it was then Liske's impression that this was Treichel's first communication of the Filtec decision to the electricians in south packaging.

Liske testified that Treichel informed the employees present that the company had reversed its earlier decision and given the machinists the installation of the inspection head previously performed by the electricians. According to Liske, the men accused Treichel and the Union of not doing enough. Some said the company had waited till the Union contract was ratified the previous day, October 31, before announcing the Filtec decision because there

had been a rejection of the company contract offer prior to October 31. Others said the company had been knuckling under to the machinists. Liske felt as did others, he said, that going the legal route of grievance and arbitration was futile. Further, he was in agreement with the suggestion (which he said he did not make) of "hitting the bricks" (walking out). Liske testified that Treichel did not suggest the walkout or support the decision in favor of it, nor was there anything that Treichel said that influenced him to leave work on November 1.

Electrician Liske further testified that after he changed to street clothes and was on his way from the locker room heading to clock out, he was stopped by his Supervisor Orville Witt and Unit Manager Ed Beers, who ordered him to go back to work, or be subject to discipline including discharge. Liske replied, the men were going to the Union hall to get the Filtec matter resolved and went down the stairway and punched out with his fellow employees. He also testified that he did not obey the supervisor's order to return to work because his fellow employees were going to the Union hall and so was he, that the decision to disobey was his own and that there was no threat of Union discipline if he did not walk out. Further, he was aware that some electricians stayed on and that there was no Union action taken against them.

Electrician Carl Rutz testified, as did Liske, that it was normal practice for the stewards to inform the electricians of decisions by management. However, he said he was not present when steward Treichel communicated the Filtec decision to his colleagues, having been working on a breakdown in shipping just before noon of November 1, but he learned of the decision from several of the men as he came into the south building 60 lunchroom just after 12 noon. Steward Treichel was not there. Rutz

said the men were saying "nasty" things, expressing disgust with the stewards, saying that they could not get their stewards to do anything, and it was time that the men themselves did something. He said he participated in about 25 minutes of discussion in which the group decided to leave to go to the Union hall. There was no indication, said Rutz, that Treichel had suggested they leave, and it was clearly not Treichel's decision, nor the decision of steward Szewczuga who was stationed on the north side, that the men leave their work to go to the Union hall. Rutz testified that he was aware of the no-strike clause in the Union contract and that by leaving work he could be subject to discipline including discharge.

Rutz further testified that he went to put away equipment he had been working with in the shipping area and his tools before coming to the locker room to change clothes, and found most of the men changing or already in street clothes. Steward Treichel came in in his work clothes and changed and, following the other men, went downstairs with Rutz to the electric shop. Rutz went to the timeclock and punched out, but Treichel bypassed the clock telling Rutz he had already punched out before coming up to change clothes.

Unit Maintenance Manager Ed Beers testified that he accosted several of the electricians as they were about to punch out or go out. He said he told electrician Roland Liske to return to work and that Liske replied he could not. Beers said he ordered electrician Greg Nowacki to return to work, but that Nowacki refused and answered that he was concerned with peer pressure, that he had to work with his fellow employees.

Steward Treichel testified that he was the last of his group to leave the building. Unit Maintenance Manager Ed Beers followed and called to the retreating figures to

come back. Apparently Treichel, Liske, and Rutz heard him, but only Treichel stopped and returned to talk to Beers. According to Treichel, Beers asked what was happening, and Treichel replied he was going to the Union hall with the men on Union business. Beers told him, if he and they didn't come back, all were risking discipline including discharge. According to Beers, Treichel answered, I know but we can't. Beers said there are established procedures for handling the problem, and, according to Beers, Treichel answered, not for us Ed. Treichel testified he did not recall saying that or what if any comment he made to the reference to procedures. In any event, according to Treichel, the conversation ended with Beers saying, I wish you'd come back, and Treichel answering, I wish I could. Treichel rejoined the others and went to the Union hall.

The Walkout from North Packaging

As already noted, after 11:30 a.m. on November 1, following telephone notification of Union Representative Carrera by Union stewards Treichel and Szewczuga of the Filtec decision, the two stewards separated. Treichel returned to his south building 29 and to its lunchroom, and Szewczuga went to the nearby lunchroom in his area, on the third floor of north building 26 not far from the third floor electric shop in the adjacent north building 29. A group of Szewczuga's fellow electricians were there having lunch and asked the result of the 11 o'clock meeting on the Filtec. Szewczuga told them that the company had reversed the prior decision on the inspection head and given the installation of it to the machinists.

As Szewczuga testified, the men were irate, accused the stewards and the Union of not doing their jobs, and asked what are you fellows doing to represent us.

Szewczuga answered, they were doing the best they can, that Union Representative Carrera knew of the decision, and would take proper action.

Approximately 5 minutes after he arrived in the lunchroom, Szewczuga was called to take care of a breakdown of the Filtec on a can line which was in a part of his work area, one floor below in north building 26. He went to do the work, leaving on the table the copy of the written decision given him in the 11 a.m. meeting. He did the repair (of a Filtec not rejecting partly filled cans) in about 5 minutes, watched it for about 10 minutes to see that it worked properly, then returned to the lunchroom just a few minutes before 12 noon. The men were gone, and he picked up his lunch pail and went on to his electric shop in north building 29. He found the men discussing and arguing about the written Filtec decision he had left in the lunchroom.

Steward Treichel called from south packaging, and he and Szewczuga exchanged information on the angry reactions each was getting from his colleagues, and agreed, as prearranged, to meet and talk to steward Collins in south brewing building 15. Szewczuga told his fellow electricians he was going across the street to join Treichel in talking to Collins about any help they might get out of the recent contract negotiations.

From the brief meeting with Collins and Treichel (already discussed above), steward Szewczuga came back to the north side, and apparently went directly to his work station. Szewczuga testified that at about 12:40 p.m., he received a page call, picked up the phone and an unidentified voice told him, we're going to the Union hall and we want you to come down too, and hung up. Szewczuga immediately headed for the electric shop on the third floor of building 29.

On his way there, said Szewczuga, he passed Electrical Supervisor Gary Grande and alerted him (as the first supervisor he had seen, according to the testimony of Supervisor Grande), that it appeared that Szewczuga's fellow employees were going to a meeting at the Union hall. Arriving in the electric shop, Szewczuga said, he found some of the men already in street clothes. He told the men it would be best if they stayed and tried to resolve the matter, and asked that they at least wait till Union Representative Carrera could do something, such as file a grievance; but the response he got, said Szewczuga, was that they were not ready to believe in grievances at this point after the experience with the electric lift trucks and other lost grievances, and now being deprived of the Filtec assignment on the day after they ratified the Union contract.

Electrician Ken Entringer, who was stationed on the north side for temporarily doing work in south side packaging, spent about 15 minutes in the noon period meetings of the north side electricians in the lunchroom and electric shop when steward Szewczuga was not there. Entringer testified that the electricians spoke angrily of being used as "pawns" of the company by a seeming grant of the work on the Filtec inspection head before they ratified the Union contract with Respondent, and taking it away the day after the electricians ratified the contract; and they spoke of their exasperation with not only the company, but also with the Union and the stewards. There was talk of "let's hit the bricks" (walk out) and go to the Union hall, and by the time he left the meeting, said Entringer, there was close to a unanimous consensus to go to the Union hall.[8] Further, he said, there was no arrangement by the men with the stewards to leave concertedly.

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8. Steward Szewczuga testified that four of the north side electricians did not join the walkout, and that he had said nothing to them or they to him.

Electrician Entringer testified that he went back to his work station on the south side to put away his tools, then came back to north side to the locker room to change to street clothes, then to the electric shop for his lunch box, and encountered steward Szewczuga for the first time that day. When Szewczuga asked Entringer where he was going, he replied, flippantly, look out the window and, without giving Szewczuga time to say more, left. Entringer testified that he was aware of two electrical supervisors, Fry and Grande, who had appeared and were attempting to give orders to return to work; and he knew he should have returned to work and knew of the contract prohibition against walkouts. Entringer punched out (the timeclock was in the electric shop), and testified that he was the first of his section to leave the plant and that Szewczuga was the last to come out.

Steward Szewczuga testified that when he realized his pleas to the men were of no avail, he tried to reach steward Treichel on the south side by phone for any word on Union Representative Carrera, and then tried to reach Carrera directly, both without success. Szewczuga concluded he should accompany the men to the Union hall, went to the locker room to change to street clothes, and returned to the electric shop in order to pick up whatever documentation he had on the Filtec and to clock out.

While Szewczuga was getting his documents from his work bench, Packaging Maintenance Manager Jablonowski and Supervisor John Scobie came in and told Szewczuga it would be illegal for the men and him to go out and that all were subjecting themselves to discipline and possible discharge. Szewczuga replied that he understood, but that he could do nothing with the men, they were angry and were going to the Union hall and wanted their steward at the Union hall. He testified that he mentioned

some of the causes of anger of which the men had told him, such as taking away the Filtec assignment after the electricians ratified the Union contract, and apprehension that the Filtec would be lost as they lost the electric forklift truck assignment. Szewczuga then clocked out and went to the Union hall with his fellow electricians. He testified that, in his 26 years of employment, this was the first walkout by the electricians.

Packaging Maintenance Manager Jablonowski testified that after his return from lunch on November 1, he was alerted that there might be a work slowdown of the electricians going on, and Supervisors Grande and Fry came to him saying Grande had been told by electrician steward Szewczuga that a Union meeting was in progress. Jablonowski called Supervisor Ed Beers to check on the south side, and himself took several supervisors to the third floor electric shop in north side building 29. They encountered employees in street clothes. He asked his supervisors to go about and remind the employees that they were engaged in an illegal work stoppage and were subjecting themselves to being disciplined, and to order them to return to work.

Observing steward Szewczuga gather papers at his work bench, Manager Jablonowski asked Szewczuga if he could stop the men, and there ensued the discussion described above by Szewczuga. Jablonowski further testified that Szewczuga gave no direction to any of the employees to leave, and did not countermand any order by a supervisor to an employee. Likewise, Electrical Supervisors Grande, who was among the supervisors directing the employees to return to work on penalty of discipline including discharge, testified that Szewczuga did not countermand or interfere with Grande's instructions to the electricians.

Stay-In at the South Brewing Department Lunchroom

The 7 first shift electricians in south brewing department building 15, of which electrician Ted Collins was one and also Union steward, were apparently the last of the three groups of electricians to learn, officially, of the revised Filtec decision on November 1, when stewards Treichel and Szewczuga, after first informing their respective groups in packaging, transmitted the information to steward Collins. Collins also learned of the angry reaction of the other two groups from the two stewards, and of the indication, which had already surfaced in Treichel's south packaging group, that they were talking of a walkout to the Union hall.

Collins informed his group, who were in the lunchroom, of what he had learned. According to Collins they took up the cry that everything was going to the machinists, because, it was said, many management people had been machinists at one time. They said they would go down to the Union hall to get explanations and action. Collins told them it was against the contract and rules to leave their work, but as he testified, his explanation did not seem to help.

Collins said he decided to go with his group, and went to his supervisor, Floyd McFadden, electric supervisor for brewing operations, to tell him what the group had decided, and that he was going with them to keep order if he could. Supervisor McFadden immediately called Industrial Relations Manager Feinsinger. Feinsinger took Labor Relations Manager Paulicivic with him, gathered up Supervisor McFadden, and together the three management representatives went into the lunchroom of south building 15. According to Paulicivic and Feinsinger the electricians were upset, and some were already in street clothes ready to leave for the Union hall.

Paulicivic testified that he and Feinsinger ordered the men back to work on penalty of discipline including discharge, telling them they were engaging in an illegal work stoppage in violation of the Union contract. The men replied, he said, you are violating the contract by giving away our work as you did in the electric forklift case. None of the men returned to work. Feinsinger told steward Collins to call stewards Treichel and Szewczuga, but Collins was unable to reach them.

Paulicivic testified that steward Collins was having a difficult time in controlling his colleagues, and said so, but that he was asked to try to hold them in the lunchroom. Feinsinger called Union Representative Carrera to come out to the plant in a hurry to stop a walkout, and he arrived in about 15 minutes. Feinsinger then told steward Collins that Carrera had come to the plant and to hold the electricians in the lunchroom until the matter was settled. Collins informed his colleagues that Carrera was now in the plant, and they stayed in the lunchroom.

When Union Representative Carrera arrived he was met by Industrial Relations Manager Feinsinger and Labor Relations Manager Paulicivic, who told Carrera that there were 7 electricians in the lunchroom who wouldn't go back to work and that the other electricians had left the plant. Carrera reproved Paulicivic (as the latter acknowledged) for not calling Carrera before the Filtec decision was announced so that he could have talked to the electricians about it, and then went into the lunchroom to talk to the 7 men about getting back to work. Carrera testified that they were in a bad state, complaining of their stewards and of him, saying that when they "went by the book" on grievance and arbitration in the electric forklift truck case they still didn't get the work that was awarded to them in the arbitration, and shouting

let's get out and join the others. Carrera asked, what would it take to get them back to work. The response was, assurances of no reprisal against the employees, including those who had walked out.

Union Representative Carrera went to consult with the management representatives. He ended up talking to Corporate Industrial Relations Manager Koenig. Milwaukee Industrial Relations Manager Feinsinger, and Milwaukee Labor Relations Manager Paulicivic. They discussed two matters.

In the matter of the Filtec work assignment, it was agreed that Respondent would give notice that it was instituting the revised work condition giving the installation of the inspection head to the machinists, and the electricians' Union would inform Respondent by letter of an intention to strike on that account, affording Respondent an opportunity to file a charge with the Board under Section 10(k) of the Act alleging a violation of Section 8(b)(4)(ii)(D), thereby putting the jurisdictional dispute before the Board to decide.[9]

In the matter of discipline of employees for the work stoppage, there was no clear agreement or promise as Union Representative Carrera conceded, but rather an indication to him by Respondent's representatives of what would likely eventuate. As Labor Relations Manager Paulicivic said, Carrera stated he didn't want any of his people fired. In reply, Corporate Manager Koenig referred to past practice where he said, the worst that had happened (when employees resumed work promptly) was a

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9. This arrangement was kept. Respondent filed a charge before the Board under Section (k) of the Act, and the Board decided the dispute in favor of the machinists. *Local 494, International Brotherhood of Electrical Workers*, 235 NLRB 1550 (May 1978).

reprimand and warning, which was put into the offending employee's file, and that Koenig did not expect that anything more severe would happen here. (Labor Relations Manager Paulicivic thought Koenig had been referring to past situations where employees did not leave the plant property, but Carrera's testimony did not indicate that Koenig had drawn any such distinction.)

With these understandings on two matters, Carrera indicated he would be helped in getting the men back to work. He called the Union hall and found that there were 17 men there, including the two stewards Treichel and Szewczuga, and asked that the stewards hold everyone there till he got back. He then proceeded to the lunchroom, and, as he testified, explained the arrangement he had made with the company on the Filtec assignment, and that, on discipline, management had indicated there would be no repercussions other than written reprimands and warnings in the employees' files. According to steward Collins, the electricians in the lunchroom, apparently were satisfied with Carrera's explanation, particularly that there would be no discipline for any electrician greater than a reprimand and warning, and, it being close to quitting time, agreed to return to work in the morning and checked out.

At management request, steward Collins went across the street to tell the second shift electricians to start work and in turn to tell the third shift electricians to start work when they came in.

E. *The Return to Work and Respondent's Investigation*

Having obtained the promise of the brewing department electricians to return to work the next day, November 2, Union Representative Carrera hurried from the brewery

to the Union hall where the 17 electricians of the first shift packaging department were awaiting his arrival. They had come to the hall in their cars at about 1:30 p.m., and Carrera arrived about 3:30 p.m., after telephoning from the brewery and telling stewards Sczewczuga and Treichel to hold everyone there until he got back.

As several employees testified, there was a good deal of turmoil and display of temper as the employees awaited Carrera. According to the testimony, stewards Szewczuga and Treichel attempted to keep order, but had little to say otherwise except that when several employees suggested inviting the second shift electricians to the Union hall both stewards said it was not a good idea, and it was not done.[10]

Carrera testified that when he arrived at the Union meeting hall, the men, other than Szewczuga and Treichel, "jumped" on him with their frustration and anger and clamor that they would not go back to work. When he got the men quiet enough to listen, he said, he explained the solution he had arrived at with Respondent for resolving the Filtec dispute under Section 10(k) of the Act, and told them if they returned to work the next day he had been informed by management that up to this time punishment meted out in similar situations had been a written reprimand for the infraction and a warning notice in the personnel file of the offending employee. Based upon this information, Carrera said he began to obtain general agreement on the men returning to work. While most of them reacted guardedly to the solution, said Carrera, both

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10. Apparently, however, one of the proposers of the idea, electrician Greg Mecha, called electrician Jerome Moss, who was normally a first shift employee but worked second shift that week, and Moss got hold of two other second shift electricians in his neighborhood and all three went to the Union hall after telephoning the plant they would be late. Ultimately, the three forfeited pay for the several hours not worked that day.

stewards Treichel and Szewczuga spoke in favor of it and urged that returning to work was the best way to go. Carrera testified that from what he observed in the three hours of meeting with these employees he did not gather that Treichel or Szewczuga had led the employees out of the plant.

Because he had forgotten to discuss with Corporate Industrial Relations Manager Koenig the matter of who would do the installation of the disputed Filtec inspection head work pending resolution of the jurisdictional issue, Union Representative Carrera took two of the most vociferous of the employees (not the stewards) to the telephone with him and called Corporate Manager Koenig. Koenig stated that the [illegible]inists opposed any electricians doing the work even tentatively, including outside electricians such as McGaw's employees, and he would therefore try to obtain interim help for the disputed work from the manufacturer of the Filtec or from a millwright company.

The meeting at the Union hall ended about 6:30 p.m. on November 1, with a resolve that the electricians would return to work November 2.

The second and third shift electricians did not engage in a work stoppage on November 1, and all shifts were back to work on November 2 and thereafter.

On November 2, Respondent launched an investigation of the work stoppage, consisting of interviews of first the supervisors on November 2 and then the electricians on November 3. The investigation appeared to have been largely if not entirely completed on November 3. Labor Relations Manager Paulicivic was in charge of the investigation and, together with Packaging Maintenance Manager Jablonowski, who participated in the investigation, made the effective recommendations for discipline of the em-

ployees who participated in the work stoppage. The recommendations were approved by Milwaukee Industrial Relations Manager Feinsinger, then by Resident (Plant) Manager Mundt, and passed on for adoption and adopted by Corporate Industrial Manager Koenig and Corporate Labor Relations Manager Dockery.

Union Representative Carrera and several employees called attention, in their testimony, to the fact that Respondent withheld announcing the discipline until after the Union signed its new contract with Respondent on November 11.

F. *The Discipline Including Two Discharges*

On November 15, 1977, without any advance notice or intimation to the Union or to the electricians, Respondent announced the discipline it was imposing for the work stoppage and walkout of November 1.

According to Labor Relations Manager Paulicivic there were three levels of discipline.

(a) For the 6 electricians who stopped work but stayed in the lunchroom of south building 15, written reprimands and warnings in their personnel records and loss of pay for the 3 hours of lost work. Steward Collins, who was the seventh electrician with them, was given no reprimand or warning but was docked for the 3 hours of lost work.

(b) For the 15 electricians who walked out, suspensions for 3 days without pay and letters of reprimand and warning in their personnel records.

(c) For the two stewards Treichel and Szewczuga, who walked out with the other 15 electricians, discharge,

because of "participation in and leadership of" the walkout, exhibits R-1 and R-2.

The announcement was made in a meeting on November 15 held by Labor Relations Manager Paulicivic and Packaging Maintenance Manager Jablonowski, to which steward Collins was summoned first, and then stewards Treichel and Szewczuga. According to the participants, concerning the discharges of Treichel and Szewczuga, Paulicivic read the discharge notice of Treichel, exhibit R-2 above, and told Szewczuga that the same applied to him. Collins testified that this was a total surprise and that Treichel asked, for himself and Szewczuga, are we being fired because we're stewards, and that Paulicivic replied yes, that because you are stewards you are supposed to be able to control your men and make them do what you want them to do.[11]

At trial, Manager Paulicivic and Jablonowski explained how they arrived at the judgment that stewards Treichel and Szewczuga were the "leaders" of the walkout.

Manager Jablonowski testified, that as a result of both his personal knowledge and participation in the investigation, he did not know who actually called or started or led the walkout, and that in his personal dealing on November 1, with the northside walkout, he did not see steward Szewczuga direct any employees to leave or countermand orders of the supervisors to return to work.

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11. Treichel testified his words were, are you "singling us out" because we are stewards. Paulicivic said Treichel asked, are you firing us "for that," but did not contradict Collins' testimony and conceded that he did reply that as stewards, Treichel and Szewczuga should be more aware than any of the employees of the contract respecting grievances and work stoppages. I credit the testimony of Collins, a more disinterested participant, and because the additional explanations, *infra*, indicate that Paulicivic and his colleagues equated "stewardship" with "leadership" in the walkout; the answer attributed to him was reflective of his views.

However, he, Jablonowski, considered both Szewczuga and Treichel leaders because during his term as maintenance manager they were always in his office as leaders and spokesmen of their group of electricians; and, because the employer put them in the role of carrying messages to the rest of the electricians, Jablonowski expected them to report decisions to their fellow electricians and called them both to the office on November 1 to impart information to them on the Filtec that he wanted conveyed to the electricians. When the two stewards reported to their fellows that that disputed Filtec work went to the machinists, they were not misstating Respondent's position, said Jablonowski. But when the electricians started walking out and the two stewards walked out with them, the stewards were thereby condoning the actions of their fellows, signifying leadership. In sum, said Jablonowski, in the discussion at the discharge meeting of November 15, we considered Treichel and Szewczuga as leaders because they were stewards.

Likewise, Manager Paulicivic testified, as did Jablonowski, that, from personal knowledge and the investigation, he had no direct knowledge that stewards Treichel or Szewczuga started or encouraged or led the walkout. However, since they were stewards and transmitted the employer's message to the affected employees on the Filtec dispute he, Paulicvic, assumed that they had done it in such a way as to cause the walkout.[12] Indeed, he said, he

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12. To bolster this assumption, Manager Paulicivic took out of context several remarks by the two stewards in prior meetings with management which Paulicivic inferred to be indicative of a frame of mind to create a work disturbance; but it will be recalled that he and Manager Jablonowski in referring to some of the same remarks, described them as typical of the way representatives of both machinists and electricians talked at their meetings on work assignments, see note 5, *supra*, and related text. In making inferences from past events, Paulicivic took no account of Szewczuga's and Treichel's unblemished records as employees for 26 years and 12 years, respectively and for 4 years each as stewards.

regarded Treichel and Szewzuga responsible for the conduct of the electricians who stayed in at the lunchroom in south building 15, because they were the only two electrician stewards to whom Respondent disseminated the decision on the Filtec on November 1. He conceded that he did not know how the electrician stewards distributed the decision on November 1. He also conceded that the machinists representatives were given the same decision to disseminate to the machinists, and did not know and had not investigated whether they passed word around the plant that the electricians had lost again. In this regard, though Paulicivic claimed to know that the machinists were uphappy with the part of the Filtec assignment that did go to the electricians (though it was apparently with mutual consent), he admitted that the machinists filed no grievance concerning the Filtec assignments.

The Union filed grievances on the discipline meted out to all who took part in the work stoppage, according to Union Representative Carrera. Several days after November 15, in a conference of Industrial Relations Manager Feinsinger and Labor Relations Manager Paulicivic for Respondent, and Carrera and Union Business Manager Kruse for the Union, Feinsinger explained the several grades of discipline. In referring to the more severe penalty of discharge for stewards Treichel and Szewczuga, according to Carrera and Kruse, Feinsinger said, the stewards wore the badge and consequently had a greater responsibility. While Feinsinger disclaimed using the words "wore the badge," saying he spoke of leadership of the walkout, he conceded that in discharging the two men it was an obvious consideration that they were stewards and that the whole flavor of his conference discussion centered on their greater responsibility as stewards. Fein-

singer testified that he relied upon and approved the Paulicivic investigation and recommendations, and it is clear that he accepted and approved the Paulicivic-Jablonowski view that equated the stewardship of the two discharged electricians with leadership of the walkout.

Union Business Manager Kruse and Union Representative Carrera pointed out that the stewards were not officers of the Union and were not elected, but were appointed by the Union representative to serve and served, without additional compensation or benefits, as go-betweens or means of communication between the men and the company and between the company and the men. In this connection the third steward, Collins, testified that when he heard the management views on stewardship, expressed in the course of the November 15 discharge meeting, he resigned as steward; and Carrera testified (as did several employees) that he has since been unable to persuade any of the electricians at the plant to serve as stewards.[13]

G. *Conclusions Regarding Section 8(a)(1) and (3) Violations*

As already reviewed, the principal testimony concerning the actual conduct of stewards Treichel and Szewczuga before the electricians started to walk out of the plant with their fellow electricians came from the participants in the work stoppage. That testimony indicated that each of the two stewards in transmitting the Filtec decision to his group urged his fellows to let the Union handle the matter

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13. Manager Feinsinger testified that the Union grievances on discipline including the discharge went to arbitration. As a matter of information only, counsel for the Respondent noted in his opening statement at trial that the arbitration upheld the discharges, but it was further noted that Respondent's answer to the complaint did not raise this result, or deferral to the arbitration, as a defense.

of the Filtec assignment by the contract grievance process, and urged against a work stoppage when talk of a walkout to the Union surfaced; but that the employee anger and protest that put the walkout talk into action was as much aimed at the stewards and the Union for their apparent lack of success or inadequacy in holding work assignments under the contract process, as it was at the seeming favoritism shown my [(sic) by] management to machinists over electricians. There was thus no evidence that the stewards were cranking up sentiment for a walkout to the Union hall or otherwise exerting leadership of the walkout, rather that after it was apparent that the two groups were going each steward went along hoping to keep his group orderly.

On its part, Respondent assumed that the two electrician stewards not only led the walkout of the two groups, but also created the work stoppage of the third group who stayed in the brewing department lunchroom, because the two electricians were stewards, and as such had been handed the Filtec work assignment decision by Respondent to transmit to the electricians and transmitted it.

Obviously, in discharging employees Treichel and Szewczuga for leadership of the work stoppage Respondent acted on an assumption or belief, without foundation in and contrary to the fact, that employees Treichel and Szewczuga had performed in a wrongful manner their Union related and protected function under the Act as stewards,[14] in transmitting Respondent's work assignment decision to their fellow employees. An employer may not discharge an employee for even a good faith but mistaken belief that he was guilty of misconduct while engaging in protected activity, and such discharge violates Section

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14. The union office of steward or committeeman "embodies the essence of protected concerted activities." *General Motors Corp.*, 218 NLRB 472, 477 (1975), enf'd 535 F. 2d 1246 (C.A. 3, 1976).

8(a)(1) of the Act, *N.L.R.B. v. Burnup and Sims, Inc.*, 379 U.S. 21, 23-24 (1964).

In connection with disciplining the two stewards for their actual participation in the illegal walkout, while it is true that the employer may "pick and choose" from among the offending employees it proposes to discipline including discharge, it cannot discriminate among such employees on the basis of union considerations, *American Beef Packers, Inc.*, 196 NLRB 875 (1972). Here all of the participants who engaged in the work stoppage were punished by a three day suspension or less, except Treichel and Szewczuga who were discharged because they were stewards and allegedly had a greater responsibility than other employees to refrain from, if not deter, such conduct. The evidence was that both stewards did attempt to deter the walkout by arguing with their fellows for use of the grievance procedure and against the walkout. The question reduces itself to whether their joining their fellows, who had decided to walk out, justified the employer in imposing the greater penalty of discharge upon the stewards because they were stewards, in contrast to the lesser penalty on employee participants who were not stewards.

The Board recognizes that a greater penalty than that given other participants may be applied to the participating steward where he actively led and directed the wildcat strike, *Chrysler Corp.*, 232 NLRB 466, 477 (1977); or sought to induce employee participation in a contractually prohibited slowdown, *Midwest Precision Castings Co.*, 244 NLRB No. 63, 102 LRRM 1074, 1076 (August, 1979).

However, the Board has held that selecting an employee for discipline, or imposing upon him a greater penalty than imposed upon others who breached a no-walkout contract provision, because the employee is a union steward, is discrimination against the employee on the basis

of his holding union office and violates Section 8(a)(3) of the Act, *Precision Castings Co.*, 233 NLRB 183, 184 (1977), where the employer selected for suspension, five employees, who joined a contractually forbidden walkout, because the five were stewards and supposedly failed to abide by their contractual obligation to take all reasonable steps to restore normal operations; *Indiana and Michigan Electric Co.*, 237 NLRB No. 35, 99 LRRM 1111, slip op. 6-8 (1978), finding that the contractual language did not constitute a recognition that the stewards (who joined a walkout after it began) had taken a higher risk than other employees; and, *Gould Corp.*, 237 NLRB No. 124, 99 LRRM 1059 (1978), holding that the steward, who joined a two hour work stoppage and was the only employee discharged, was discharged not for his actions as an employee but because of his lack of actions as a steward, which the Board said was a legally impermissible criterion for discipline under the Act that was not validated by the contract clause specifying responsibilities of union officers.

The Seventh and Third Circuit Courts of Appeals, respectively, declined to enforce the latter two decisions, *Indiana and Michigan Electric Co. v. N.L.R.B.*, 599 F. 2d 227, 101 LRRM 2475 (C.A. 7, May 1979); and, *Gould Inc. v. N.L.R.B.*, F. 2d , 103 LRRM 2207 (C.A. 3, December 1979), and in the course of doing so also expressed disapproval of the lead case, above, *Precision Castings Co.*

The principal disagreement between the two Courts, on the one hand, and the Board, on the other hand, is the Court view that selecting the steward for separate, or more severe discipline (than is applied to other employee participants in a work stoppage forbidden by contract) is not inherently destructive of protected employee rights under the Act because the steward is already bound as an employee, as well as a union official, not to violate the con-

tract prohibition; and the more severe punishment is based upon breach of the higher responsibility that accompanies the official status as steward, a breach that makes the steward's misconduct more serious than that of the rank-and-file, C.A. 7 at 101 LRRM 2477, C.A. 3 at 103 LRRM 2210-2211. Both Courts derived from the contractual provisions in each case a positive duty upon the stewards to take steps to terminate the illegal work stoppage (in *Gould*, provisions binding the union officers and representatives to take steps to cause the illegal activity to cease, to refuse to aid such action, and to use reasonable efforts to terminate such action; in *Indiana and Michigan Electric*, provisions that the employees will not be called upon or permitted by the union to engage in illegal work stoppages).

In comparing these two cases with the case at bar there may be a basis for a distinction in that the contract clause pertaining to unlawful work stoppages, see heading *B* above, has no special undertaking that could be said to place a special or specific duty upon the stewards in connection with forbidden work stoppages. It simply provides that the Union agrees for itself and its members that there shall be no (forbidden) work stoppage.[15]

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15. In a more recent decision of September 28, 1979, *Armour-Dial, Inc.*, 245 NLRB No. 123, where the Board found that the employer had singled out four union committeemen for discipline of suspension because of a work stoppage that the four employees did not engage in or induce but from which they refused to disassociate themselves, the Board held that the employer violated Section 8(a)(3) and (1) of the Act because the basis for the discipline must be misconduct itself, and not the employee's position as a union official (citing its *Precision Castings* and *Gould* decisions, *supra*). The Board pointed out that the no-strike clause contained no requirement that union officials take appropriate steps to prevent violations of the clause or allowing the employer to discipline officials on the basis of their failure as union officers to abide by the contract; and the Board added that it was not reaching the issue of whether a union could, by contract, waive an employee's right to engage in protected concerted activity through holding of union office by providing for the discipline of union officials. Slip op. p. 4.

However, aside from the question of whether the two circuit opinions in *Indiana and Michigan Electric* and *Gould* are distinguishable from the case at bar on the contract issue, it appears that the Board has not yet addressed itself to the question of whether it acquiesces in (or declines to follow) the disapproval by the two Circuit Courts of the Board rationale in the two cases (as well as the earlier *Precision Castings* case). In that state of affairs, I am obliged under established precedent to adhere to *Precision Castings, Indiana and Michigan Electric,* and *Gould,* as decided by the Board, as the existing Board law not reversed by the Board or the Supreme Court, *Insurance Agents International Union,* 119 NLRB 768, 773 (1957); *Novak Logging Co.,* 119 NLRB 1573, 1575-1576 (1958); *Iowa Beef Packers, Inc.,* 144 NLRB 615, 616-617 (1963); *Nello Pistoresi and Son,* 203 NLRB 905, 906, n. 2 (1973), notwithstanding the fact that the case at bar arose in the territorial jurisdiction of the Seventh Circuit.

Hence, I am of the opinion that the discharge by Respondent of employees Treichel and Szewczuga, constituting a greater discipline than that visited upon the other participants in the walkout and imposed because the two employees were Union stewards, was discriminatory and in violation of Section 8(a)(3) and (1) of the Act. In this connection it should be noted that the discharges of the two stewards have actually discouraged all of the remaining electricians, including the former third steward who resigned as steward as a result of the discharges, to decline to serve as stewards, and has effectively deprived the unit of its full statutory and contractual right of representation in matters requiring or calling for the presence or participation of stewards.

Conclusions of Law

1. Respondent's discharge of employees Szewczuga and Treichel, from among the 24 electrician employees who participated in an unauthorized work stoppage on November 1, 1977, imposed as a greater discipline than was imposed upon the other participants because the two employees were Union stewards, was discriminatory and constituted unfair labor practices in violation of Section 8(a)(3) and (1) of the Act. The discharge, on the further basis of an unproven accusation or mistaken belief by Respondent that the two stewards were the leaders of the work stoppage and walkout, constituted further unfair labor practices in violation of Section 8(a)(1) of the Act.

2. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

It will be recommended that the Respondent,

(1) cease and desist from its unfair labor practices;

(2) offer to reinstate employees Szewczuga and Treichel, and give each backpay from the date of their discharges, November 15, 1977, said backpay to be computed on a quarterly basis as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), approved in *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977);[16] and

(3) post the notices provided for herein.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of

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16. See generally, *Isis Plumbing & Heating Co.*, 231 NLRB 716 (1962).

the Act there is hereby issued the following recommended:[17]

ORDER

Respondent, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging employees or discriminating against them in regard to their hire, tenure, or any term or condition of employment, because of their protected concerted activities or because they hold union office in the bargaining unit when engaging in protected concerted activities.

(b) In any like manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make employees Ervin Szewczuga and Gerald Treichel whole, in the manner set forth in the section of the decision entitled "The Remedy," for any loss of earnings incurred by each of them as a result of their discharges on November 15, 1977.

(b) Offer to both of said employees immediate and full reinstatement to their former jobs, or if the jobs no longer exist, to substantially equivalent positions, without

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17. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

prejudice to the seniority or other rights and privileges of each.

(c) Preserve, and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to ascertain the backpay due under the terms of this Order.

(d) Post in the plant at Milwaukee, Wisconsin, copies of the attached notice marked "Appendix."[18] Immediately upon receipt of said notice, on forms to be provided by the Regional Director for Region 30 (Milwaukee, Wisconsin), the Respondent shall cause the copies to be signed by one of its authorized representatives and posted, the posted copies to be maintained for a period of sixty consecutive days thereafter in conspicious places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 30, in writing within twenty days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. April 2, 1980

/s/ Herzel H. E. Plaine
Herzel H. E. Plaine
Administrative Law Judge

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18. In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

THE NATIONAL LABOR RELATIONS BOARD HAVING FOUND, AFTER A TRIAL, THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT:

WE WILL NOT discharge employees or discriminate against them in regard to their hire, tenure, or any term or condition of employment, because of their protected concerted activities or because they hold union office in the bargaining unit when engaging in protected concerted activities.

WE WILL NOT, in any like manner, interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act.

BECAUSE the Board found that we unlawfully discharged employees ERVIN SZEWCZUGA and GERALD TREICHEL, WE WILL offer them their former jobs, and

WE WILL give each of them backpay with interest from the time of their discharges, November 15, 1977.

Miller Brewing Company

(Employer)

Dated ..... By .....

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Commerce Building - Suite 230, 744 North 4th Street, Milwaukee, Wisconsin 53203, Telephone (414) 291-3866.

Office - Supreme Court, U.S.
FILED
NOV 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-666

In the Supreme Court of the United States

OCTOBER TERM, 1982

MILLER BREWING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board
Washington, D.C. 20570

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. In this case the Board found (Pet. App. A26-A79) that petitioner Miller Brewing Company violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), when it discharged two union stewards for participating in a walkout that violated a no-strike provision in the applicable collective bargaining agreement, but imposed much less severe sanctions on rank-and-file employees participating in the same walkout. In reaching this conclusion, the Board applied its rule that, while employers are free to discipline any employee, *including* any employee who holds union office, for violating a no-strike clause, and may also punish acts of actual strike leadership more severely than mere participation, they are barred by Section 8(a)(3) and (1) of the Act from predicating harsher discipline simply on an employee's status as a union officer. Here, the Board found that the stewards had initially tried

to dissuade the employees from walking out and that they had not acted as leaders of the walkout when it occurred (Pet. App. A71-A73). Hence, the Board concluded (*id.* at A76) that the especially severe sanction imposed on the stewards was imposed on them simply because they were union stewards, and that petitioner thereby unlawfully discriminated against them on the basis of union-related considerations.

2. The court of appeals enforced the Board's order (Pet. App. A1-A25). It concluded that the Board's finding that the stewards were not actual leaders of the walkout was supported by substantial evidence (*id.* at A11-A12), and it agreed with the Board's finding that the selective discipline meted out to the stewards violated Section 8(a)(3) and (1) of the Act, since the union had not contractually consented to the imposition on union officers of any special duty different from the duty imposed generally on all employees to abide by the no-strike clause (Pet. App. A20-A24).[1]

DISCUSSION

The question petitioner presents in this case is "[w]hether union officials may be held to a higher duty than rank-and-file employees to uphold a collectively bargained no-strike

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[1]With respect to the contractual question, the court held that a general no-strike clause is not a sufficient waiver by the union of employees' rights to hold union office free of the threat of a more severe standard of discipline than that applied to rank-and-file employees (Pet. App. A15). It further held that petitioner was barred by Section 10(e) of the Act, 29 U.S.C. 160(e), from presenting to the court its contention that an arbitrator's award upholding the stewards' discharges constituted a basis for finding that the agreement clearly imposed higher duties on union officers. Petitioner had neither presented that theory to the Board nor shown extraordinary circumstances excusing its failure to do so, and the arbitral award had not been made a part of the administrative record (Pet. App. A15-A20). See *Woelke & Romero Framing Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982), slip op. 20-21.

agreement, including an obligation to take affirmative steps to deter or end any action in breach thereof, and whether an employer commits an unfair labor practice by selectively disciplining union officers for failing to satisfy that duty" (Pet. I). As petitioner concedes (Pet. 6 n.2), that question is also presented in *Metropolitan Edison Co.* v. *NLRB*, cert. granted, No. 81-1664 (June 14, 1982). The briefs of all the parties have been filed in the latter case, and petitioner has filed a brief as amicus curiae in support of Metropolitan Edison. Petitioner offers no reason why there should also be full briefing and oral argument in this case.

It is therefore respectfully submitted that the petition for certiorari should be held and disposed of in light of the Court's decision in No. 81-1664, *Metropolitan Edison Co.* v. *NLRB*.[2]

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

NOVEMBER 1982

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[2]A copy of the Board's brief in *Metropolitan Edison* has been served on petitioner.

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No. 82-666

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MILLER BREWING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
ERVIN SZEWCZUGA and GERALD TREICHEL,
Respondents.

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS SZEWCZUGA AND TREICHEL

GERRY M. MILLER*
SCOTT D. SOLDON
GOLDBERG, PREVIANT, UELMEN, GRATZ,
MILLER & BRUEGGEMAN S.C.
788 N. Jefferson Street
P.O. Box 92099
Milwaukee, Wisconsin 53202
414-271-4500
Attorneys for Respondents Szewczuga and Treichel

* Counsel of Record

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED FOR REVIEW

Respondents Szewczuga and Treichel frame the issue as follows:

Whether union officials who participate in but do not lead unlawful strike activity may be singled out for more severe discipline under a general no-strike clause simply because they are union officials?

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Other Authorities:

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS SZEWCZUGA AND TREICHEL

STATEMENT OF THE CASE

In November, 1977 Miller Brewing Company discharged respondents Szewczuga and Treichel (A. 68). Szewczuga and Treichel were stewards to provide in plant representation to the members of Local Union 494, International Brotherhood of Electrical Workers, AFL-CIO in Miller's employ and had 26 and 12 years respectively of unblemished service as electricians at Miller's Milwaukee brewery (A. 69-A. 70). Following a short two hour work stoppage by first shift electricians in their departments during which the two stewards merely accompanied the members to the union hall in an effort to keep order, Miller summarily terminated both men while imposing only three day suspensions on all others who left the brewery (A. 28, A. 40, A. 72). Since the stewards were fired, no electrician has

been willing to serve as steward at the brewery (A. 76). Based on findings that the two stewards "could have done little else but what they did" and did "attempt to quell the rising tide favoring that walkout" and that their employer had neither a "basis for believing" nor a "good faith belief" that the stewards had incited, encouraged or led the walkout, the National Labor Relations Board concluded that Miller fired them based upon "their union stewardship position alone." (A. 29, A. 13)

Neither the collective bargaining agreement which merely contained a general no-strike clause nor prior arbitration awards imposed any special obligations upon union stewards in unlawful strike situations or in any other way waived their statutory protection against discrimination because of their union status (A. 75, A. 44). Although an arbitrator had ruled against the discharge grievances of Szewczuga and Treichel before the administrative hearing opened in this case, the award was not introduced into evidence or relied upon by Miller before the Board (A. 71, A. 15-A.16). The court of appeals ruled that Miller's failures in these respects were not excused by extraordinary circumstances and therefore that § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), barred Miller from objecting to the Board's order based upon the arbitrator's *post hoc* interpretations of the collective bargaining agreement (A. 18-A. 20).

SUMMARY OF ARGUMENT

The petition for certiorari in this case should be denied because the slim possibility that the Court will reach and decide the second question upon which the writ was granted in *Metropolitan Edison* v. *NLRB*, 663 F.2d 478 (3d Cir., 1981), *cert. granted* No. 81-1664 (June 14, 1980) contrary to the way it has been answered by the Board and all reviewing courts to date is clearly outweighed by the certain damage these respondents and their fellow working people will sustain if justice is delayed for the many more months that it may take for this Court to act

if a ruling on this petition is held in abeyance. Although the circuits are divided on whether prior arbitral interpretations imposing special duties upon union officials under general no-strike clauses are the legal equivalents of clear contract language to this effect, that issue, the first question upon which certiorari was granted in *Metropolitan Edison,* is not presented here. Unless that question is answered in the negative, this Court's decision in *Metropolitan Edison* will not be dispositive of the issue here, which is the second question presented in that case, but the one on which the Board and all of the reviewing circuits are presently in agreement. Thus, although the bare possibility that the decision in *Metropolitan Edison* will have some bearing on the issue here cannot be ruled out, the petition should be denied because of the direct harm that further substantial delays in obtaining a final adjudication will surely work upon the individual respondents in this case, who have already waited five years for the legal process to vindicate their rights.

ARGUMENT

I. Miller's Petition For Certiorari Should Be Denied Since Neither The Contract Nor Prior Arbitral Awards Imposed Any Special Duties Upon Stewards Szewczuga And Treichel, And Since They Did Not Act As Leaders Of The Strike.

In this case, it is undisputed that the collective bargaining agreement did not impose any special duties upon stewards Szewczuga and Treichel. Nor is there any issue in this case as to the effect of a *prior* arbitration award on the actions of the stewards in connection with the walkout. Indeed, Miller's belated attempts to utilize the award supposedly rendered regarding the discharges of Szewczuga and Treichel were properly rejected by the court of appeals. Thus there is no issue here regarding the effect of a prior arbitration award or a collective bargaining agreement which contains specific language imposing special duties upon stewards.

Contrary to Miller's disingenuous assertions, in *Metropolitan Edison* this Court granted certiorari on two questions, only the second of which may have any significance to the issues before the Court in this case:

> "(1) Does NLRB or Court of Appeals have authority to disregard clear, unambiguous and repeated arbitral interpretation of collective bargaining agreement and substitute its own contrary interpretation.
>
> (2) May union officials be held to higher duty than rank-and-file employees to uphold collectively bargained no-strike pledge, including obligation to take affirmative steps to end any action in breach thereof, and does employer commit unfair labor practice by selectively disciplining union officials for failing to satisfy that duty?"[1]

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[1] 50 U.S.L.W. 3974.

The first question is the one on which the circuits appear to be divided;[2] but because no arbitrator had previously interpreted Miller's collective bargaining agreement asimposing any special duties upon stewards and because Miller did not raise this defense before the Board that question is not posed in this case.

The courts are unanimous in upholding the Board's position on the second question in the circumstances presented here. The courts have consistently held that selective discipline of union stewards, absent a contractual basis for a higher responsibility or proof that the stewards have acted as leaders of the strike, violates the National Labor Relations Act. See *Metropolitan Edison, supra,* 663 F.2d at 481; *Fournelle, supra,* 670 F.2d at 338; *C. H. Heist Corp.* v. *NLRB,* 657 F.2d 178, 182-183 (7th Cir. 1981); and most recently *NLRB* v. *South Central Bell Telephone Co.,* 688 F.2d 345, (5th Cir. 1981). Thus the question presented by this case is one on which the Circuits are in perfect accord. Further, this Court may well not even reach that issue in *Metropolitan Edison.*

Therefore Miller's assertion that this Court in *Metropolitan Edison* is presented with the same issue as in this case[3] grossly exaggerates the issues presented here. Rather, the possibility that this Court will reach the second question in *Metropolitan Edison* is speculative and the chances that, if it does, it will reverse the Board and courts of appeals are at best remote. On the other hand, the effect of granting certiorari or, as the Board contends, holding this case in abeyance until *Metropolitan Edison* is decided, will be both direct and substantial upon the

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[2] Compare *Fournelle* v. *NLRB,* 670 F.2d 331, 341-345 (D.C. Cir. 1982), with *Metropolitan Edison* v. *NLRB,* 663 F.2d at 483-484.

[3] Petition for Certiorari, p. 6 n. 2.

individual petitioners. It will cause a further delay for a substantial period of time. A final decision in this case has been delayed far too long already and there appears to be no good reason why this litigation should not now come to an end.

In summary, the decision of the Court of Appeals for the District of Columbia Circuit is in perfect accord with that of every other court of appeals which has considered the question. Absent specific contractual obligations imposing higher duties on union officials or proof that those officials acted as leaders of the strike, union officers and stewards may not be disparately disciplined for mere participation in, or the failure to take affirmative steps to end, a wildcat strike.[4] Thus this case raises no issues of compelling importance and certiorari should be denied.

CONCLUSION

Respondents submit that the court of appeals correctly held, in accordance with the ruling of the Board and every other court of appeals that has passed on this issue, that Miller violated the federal labor statute when it singled out respondents Szewczuga and Treichel for discharge based solely upon their status as stewards. Although it is possible that the Court will reach and answer the question presented here later this Term, the possibility that it will both reach that issue and overrule the unanimous holdings of the Board and appellate courts on that issue seems extremely remote. Therefore, in light of the direct and certain prejudice to individual respondents' interests further delays will cause, the petition should be denied.

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[4] For an excellent overview of the development of the law in this area and a synthesis of the relevant cases, see Rummage, *Union Officers and Wildcat Strikes: Freedom From Discriminatory Discipline*, 4 Indus. Rel. L. J. 258 (1981).

Alternatively, individual respondents concur in the Board's view that the petition for certiorari should be held and disposed of in light of the Court's decision in *Metropolitan Edison,* No. 81-1664, since that matter has already been fully briefed and is awaiting oral argument.

Respectfully submitted,

GERRY M. MILLER
SCOTT D. SOLDON
Goldberg, Previant, Uelmen, Gratz,
Miller & Brueggeman s.c.
788 N. Jefferson
P.O. Box 92099
Milwaukee, Wisconsin 53202
414-271-4500

Attorneys for Respondents
Szewczuga and Treichel